Indiana Department of Education

Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 • 317/232-6665

1-12:95

RECENT DECISIONS

Recent Decisions is a periodic communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell, General Counsel, at (317) 232-6676 or by writing to the address listed above.

In this Issue:

GUARDIANSHIPS FOR EDUCATIONAL REASONS

Indiana has long declined to recognize guardianships established "solely" or "primarily" for educational reasons. See I.C. 20-8.1-6.1-1(a)(3). A dispute regarding legal settlement is submitted first to a local hearing examiner with appeal available to the Indiana State Board of Education (SBOE) under I.C. 20-8.1-6.1-10(a)(3)(A).[1]

Until this past year, there had been only one legal settlement appeal to the State Board involving a court-issued guardianship. In the Matter of J.L. and the MSD of Warren Township, No Cause No. (SBOE 1988; Sandra K. Bickel, Administrative Law Judge) involved a student who lived with his father within the school district but later moved into an adjoining school district. The student continued to attend his former school district, claiming his grandmother's address as his residence. A petition for guardianship was initiated after the school district challenged his legal settlement. The guardianship, which was filed on May 20, 1987, but ordered retroactive to November 1985 and was based ostensibly on the student's need to assist his grandparents in their daily needs. But it was determined through testimony that the guardianship was for the purpose of attending school in his former school district. The State Board upheld the exclusion.

This past year two important guardianship-legal settlement cases were appealed to the State Board.

In Re A.S.C. and J.F.O. and the Tippecanoe School Corporation, Cause No. 9410026 (SBOE 1995; Kevin C. McDowell, Administrative Law Judge) involved two students from Puerto Rico who met a family in Tippecanoe County while participating in a baseball tournament. The two students wished to stay in Tippecanoe County rather than return to Puerto Rico. The Tippecanoe County Circuit Court issued orders of appointment, creating a guardianship for each of the students with the family in Tippecanoe County (Attachment A). The guardianship decrees do not indicate the purpose was "solely" or "primarily" for educational reasons. Because an administrative entity does not have the authority to interfere with a court in the exercise of its

---

[1]Under former law, a student found not to have legal settlement was excluded from school but permitted to remain until the State Board completed its review. I.C. 20-8.1-5-5(2), repealed July 1, 1995. The new provisions consider the exclusion an "expulsion" but without the draconian effect of other expulsions. See I.C. 20-8.1-5.1-11 and I.C. 20-8.1-5.1-23(d). However, there is no statutory requirement that the student remain in school until the State Board completes its review, and an "expulsion" for legal settlement is subject to judicial review. I.C. 20-8.1-6.1-10(e). The State Board recently delayed a determination until the end of school so as to prevent the expulsion of four students for lack of legal settlement. See the discussion under In Re H.W., H.H., J.H. and Z.H., and the New Prairie United School Corporation, *infra*.

judicial functioning, the school's exclusion of the students was reversed by the State Board. See the discussion on p. 10 of the decision.

In the second dispute considered by the State Board, the new expulsion proceedings for legal settlement were in effect. In Re H.W., H.H., J.H. and Z.H., and New Prairie United School Corporation, Cause No. 9601001 (SBOE 1996; Dana L. Long, Administrative Law Judge) involved an appeal of challenges to the legal settlement of four students (Attachment B). Guardianships had been established for the students, but they continued to reside with their parents who do not have legal settlement in the school district. The guardianship appointments by the St. Joseph County Probate Court were for educational reasons. By statute, legal settlement cannot be established in this manner. The expulsion by the school was upheld. However, the State Board delayed official action on this mater until June 6, 1996, in order to permit the four affected students to complete the semester. See footnote 1, *supra*.

TRANSFER TUITION REGULATION CHANGES

EQUITABLE TOLLING

"ASPIRATION"

The Indiana State Board of Education has proposed changes to its regulations for transfer and transfer tuition, 511 IAC 1-6 (Attachment C). A major change is proposed for 511 IAC 1-6-2, moving back the date a transfer request is to be submitted to the school corporation of legal settlement from the first day of school to April 1 preceding the first day of school, effective for the 1997-1998 school year. There are a number of transfer tuition requests which are not filed timely with the local school district at present. The Indiana State Board of Education has not routinely dismissed such transfer tuition disputes but determines whether there are extenuating circumstances that would explain and ultimately excuse the late presentation of a transfer request to a school district. This is referred to as the doctrine of "equitable tolling," a doctrine likely to be applied more often when the April 1 deadline is established.

Equitable Tolling

"Equitable tolling" means that equitable principles require an extension of a statute of limitations or other timeline. "Equitable tolling" is generally applied where one or more of the following are present:

1. The petitioner is not represented by counsel.

2. The petitioner has not previously requested a transfer.

3. The petitioner was mislead affirmatively by the petitioner's school district regarding the

requirements for applying for a transfer and the timelines for doing so.

Reed v. Mokena (IL) School Dist., 41 F.3d 1153, 1155 (7th Cir. 1994).

The Indiana State Board of Education applied this principle in In Re S.L.M. and the Indianapolis Public Schools, Cause No. 9408020 (SBOE 1995; Kevin C. McDowell, Administrative Law Judge), denying the school's Motion to Dismiss a transfer request made by a nonpublic school student wishing to attend a vocational education program in a neighboring school district. The SBOE noted that the student sought first to attend the specific vocational program within IPS, but IPS did not provide the program. IPS affirmatively mislead petitioner regarding the process to apply for transfer and the process to appeal the denial. The petitioner was not represented by counsel. The SBOE also noted that advising the petitioner to call Indiana Department of Education (IDOE) regarding transfer requests and appeals does not satisfy the school's responsibility to inform the petitioner. To grant the Motion to Dismiss would have been inequitable. As a consequence, the Motion was denied and the late filing of an appeal was permitted. For more recent application of equitable tolling, see Attachment D involving the International Baccalaureate Program diploma.

"Aspiration"

Although the language under "curriculum" remains the same with respect to "an academic or vocational aspiration," 511 IAC 1-6-3(1), there is division among State Board members as to the previous application of the singular nature of "aspiration."[2] The statute does refer to "aspirations." See I.C. 20-8.1-6.1-2(a)(2).

The SBOE in the past has required that a student seeking a transfer have a stated vocational or academic aspiration in addition to the remaining requirements of 511 IAC 1-6-3(1). However, in a recent transfer dispute, the student expressed three (3) vocational or academic aspirations (medicine, law and music). Some State Board members interpreted the regulation as requiring the establishment of at least one vocational or academic aspiration as a threshold matter but that other aspirations could be included. Other State Board members noted that this is a departure from SBOE precedence in this regard and argued that school districts would be at a disadvantage in addressing curriculum needs when confronted with a host of possible aspirations with a diminished degree of certainty the student would pursue all or any of the stated aspirations. One SBOE member stated on the record that "an aspiration does not include a constellation of aspirations but is a specific aspiration." The SBOE granted the transfer on August 8, 1996, by a 7-3 vote. One member voting in favor indicated she would ignore the SBOE's own rule when deciding to grant transfers.

---

[2]The SBOE has indicated it may consider an International Baccalaureate Diploma as "an academic aspiration." See Attachment D and "International Baccalaureate Diploma," *supra.*

INTERNATIONAL BACCALAUREATE PROGRAM DIPLOMA: TRANSFER TUITION IMPLICATIONS

The International Baccalaureate Program (IBP) has been implemented in three Indiana high schools (North Central High School in MSD of Washington Township, Fort Wayne South Side High School, and Valparaiso High School). The IBP is not a program solely for gifted students but is generally for students who are highly motivated and who intend to enroll in college. The IBP is designed for 11th and 12th grade students, but "pre-IBP" programs designed to prepare students may begin earlier. During the final two years of high school, students in the IBP "study countries, their languages and literature, their ways in society, and the scientific forces of the environment," according to the literature from Fort Wayne South Side High School. The IBP curriculum permits a student to choose classes in English, foreign language, math, science, humanities, and a sixth elective area (classical language, music or art). Students are also required to take a class entitled "Theory of Knowledge," which is a combination of philosophy, psychology and sociology. An extended essay based upon independent research is required, as is 150 hours of community or school service. The IBP stresses the interrelationship of creativity, action, and service, with emphasis on critical thinking skills, independent research, and an international perspective. The IBP is sanctioned by the International Baccalaureate Organization. A student successfully completing an IBP program receives an IBP diploma. Although an IBP diploma does not ensure acceptance at a specific college or university, some colleges and universities have developed IBP policies which include advanced placement and course credit for students with the IBP diploma.

The IBP is not a specific curriculum geared toward a specific academic or vocational goal. The IBP was developed in the late 1960's and early 1970's to fulfill the requirements of various national education systems, and combines systems emphasizing specific curricular objectives with those which are more diverse and abstract.

On May 2, 1996 the Indiana State Board of Education decided In the Matter of K.M.W. and East Porter County School Corporation, Cause No. 9511024 (SBOE 1996, Kevin C. McDowell, Administrative Law Judge), following its previous two decisions declining to grant tuition transfers under I.C. 20-8.1-6.1-2 and 511 IAC 1-6-3(1) for students wishing to enroll in preparatory IBP programs (petitioners in all three cases were 9th grade students). However, the State Board, in its discussion of K.M.W., indicated that in future transfer tuition disputes, the State Board may recognize the IBP diploma as a specific "academic aspiration" as contemplated by statute and regulation and grant transfers.

At present, a student can request and be granted a transfer if the student can be "better accommodated" at the transferee school corporation than the transferor school corporation (the school corporation of legal settlement). Whether or not a student can be "better accommodated depends on such matters as...(2) curriculum offerings at the high school level that are important to the vocational or academic aspirations of the student." I.C. 20-8.1-6.1-2(a)(2).

The State Board's rule implementing the provision expands upon the meaning of "better accommodation" to require that such curriculum offering not only be "important" but "necessary" to the student's vocational or academic aspiration. 511 IAC 1-6-3(1) reads as follows:

> 511 IAC 1-6-3 Determination of better accommodation
>
> Except where 511 IAC 1-6-4 applies, a student will be determined to be better accommodated in the transferee than in the transferor, as provided in IC 20-8.1-6.1-2, on a showing of one or more of the following:
>
> (1) Curriculum:
>
> > (A) the student has established an academic or vocational aspiration, a curriculum offering at the high school level that is important and necessary to that aspiration is available to the student at the transferee, and that curriculum offering at the high school level or a substantially similar curriculum offering at the high school level is unavailable to the student at the transferor; or
> >
> > (B) after August 1, 1989 the student is capable of earning an academic honors diploma, the school corporation does not offer the required academic honors diploma courses, and the student has completed all academic honors diploma courses offered by the transferor.

The State Board in its previous two decisions in In the Matter of T.M. and East Allen County School Corporation, Cause No. 9408013 (SBOE 1995) and In the Matter of K.L.W. and East Allen County School Corporation, Cause No. 9409022 (SBOE 1995), declined to accept the goal of attending college as an "academic aspiration." Because an IBP diploma does not ensure acceptance at any college or university, an IBP diploma was neither "important" nor "necessary" for college attendance even if attending college were an "academic aspiration." The State Board also noted that preparatory coursework in the 9th and 10th grades were either the same or substantially similar to the courses already offered at the respective students' home school districts.

The State Board has now indicated in K.M.W. (Attachment D) that it may depart from its previous determinations in this regard and consider the IBP diploma as an "academic aspiration" such that a transfer of tuition would be granted. This may also apply to 9th and 10th grade students wishing to enroll in "pre-IBP' programs in order to ensure an enhanced opportunity in being accepted into the IBP diploma program in the 11th grade.

LEAST RESTRICTIVE ENVIRONMENT AND THE NEIGHBORHOOD SCHOOL

In D.F. v. Western School Corporation, 921 F.Supp. 559 (S.D. Ind. 1996), the district court upheld the decision of Dr. Joseph McKinney, the Independent Hearing Officer, in Art. 7 Hearing No. 713-93. His decision earlier had been reviewed and affirmed by the Indiana Board of Special Education Appeals. The issues involved the extent to which "least restrictive environment" (LRE) relates to a "free appropriate public education" (FAPE), especially where the student does not attend the school he would have attended if not disabled (typically referred to as the "home school").

The student had significant involvement, including cerebral palsy, hydrocephalus, seizure disorder, perceptual vision deficits, and communication disorder along with low intellectual functioning due to a moderate mental handicap (MoMH). He attended school in a program operated through the special education cooperative in a neighboring school district. The parents expressed a preference for his attending school in his own school district and at his home school. They and their experts believed that with sufficient support services, he could function adequately in a general education classroom. The school did not believe the student would derive any educational benefit from a general education classroom, and that support services would have to be so intense and individualized that the student would be isolated even in the class.

The district court, while acknowledging the LRE requirements under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(5)(B), 34 CFR §§300.550-300.553, and 511 IAC 7-12-2, stressed that there is no presumptive effect of LRE in favor of a home school, and that FAPE and LRE contemplate more than academic achievement or benefit. Significant holdings of the court include:

1. Mainstreaming to the "maximum extent appropriate" does not mean maximum extent feasible, at 566, or the "maximum extent conceivable," at 571, clarifying 34 CFR §300.550(b)(1). A school must "balance the preference for mainstreaming against the need for individual educational programs tailored to the special needs of the child." At 571.

2. IDEA does not provide any substantive standard for striking the proper balance between LRE and its mandate for FAPE. At 566. However, a general education class would be inappropriate for a student where modification of the curriculum would change the curriculum "beyond recognition," the student would not "be able to master" any of the general education curriculum, and the student's presence, with supplementary aids and services, would pose a significant distraction. At 568-70.

3. Too much emphasis must not be placed on "strictly educational benefits of a child's program at the expense of non-educational benefits, such as language and behavior models of other children in a class." At 566. "If a child's disabilities are so severe that

he would get little or no benefit from mainstreaming, then mainstreaming may not be appropriate, in spite of the statutory preference for mainstreaming." At 567.

4. There are four factors federal courts have employed in evaluating the appropriateness of a placement:

   (a) What are the educational benefits to the student in the general education classroom, with supplementary aids and services, as compared to the educational benefits of a special education classroom?

   (b) What will be the non-academic or personal benefits to the student in interactions with peers who do not have disabilities?

   (c) What would be the effect of the presence of the student on the teacher and other students in the general education classroom?

   (d) What would be the relative costs for providing necessary supplementary aids and services to the student in general education classroom? At 566-67, citing to Sacramento City Unified Sch. Dist. v. Holland, 14 F.3d 1308 (9th Cir. 1994), cert. den. (1994) and Oberti v. Clementon Sch. Dist., 995 F2d. 1204 (3rd Cir. 1993).

5. "Academic achievement is not the only purpose of mainstreaming. Disabled students can also benefit from exposure to their non-disabled peers." At 569.

6. A student would be placed in his home school unless his IEP requires otherwise. IDEA "state[s] a preference for local placement" but does "not require placement in the neighborhood school." At 571.

There have been several other important decisions discussing the balance between LRE and FAPE.

1. Murray v. Montrose County School District RE-1J, 51 F.3d 921 (10th Cir. 1995). This case involved a Colorado school district and a student with disabilities similar to D.F. who began school in his neighborhood school but was later recommended to attend a program in another school which could appropriately address his significant mental and physical needs. The Independent Hearing Officer (IHO) found in favor of the parents, but was reversed on administrative appeal because there was no showing the student was deriving any educational benefit from his current placement in the neighborhood school. The district court affirmed, as did the circuit court, holding that IDEA creates no presumption that LRE for a student is the student's neighborhood school even though geographic proximity is a consideration.

2. Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). This case has had the most effect on other courts, including D.F., in analyzing LRE. Daniel R.R. was a

student with severe mental retardation and communication deficits. "Mainstreaming" was attempted for one-half day in a pre-kindergarten class and one-half day in an Early Childhood class. Daniel derived no benefit from the pre-kindergarten class, and modifications to the curriculum would have rendered it "almost beyond recognition." The placement was changed to a primary Early Childhood special education program with "mainstreaming" for lunch and recess. Educational benefit is not the only or sole consideration. How the student relates to other students and how other students perceive him are important considerations also.

ATTORNEY FEES: PARENT-ATTORNEY UNDER IDEA

The Indiana Supreme Court, reversing the Indiana Court of Appeals, has held that a parent-attorney of a student with disabilities is not entitled to recover attorney fees for representation of the attorney-parent's child. This dispute began as Article 7 Hearing No. 519-91. The student was represented by his father, who is an attorney.

In Miller v. West Lafayette School Corporation, 665 N.E.2d 905, (Ind. 1996), the Supreme Court agreed with the school district that the father was acting as a "*pro se* parent and a party" rather than as an attorney, and as "a *pro se* litigant [he]...is not entitled to [attorney] fees" which are available to parents who prevail through IDEA procedures. See 20 U.S.C. §1415(e)(4)(B); 34 C.F.R. §300.515, 511 IAC 7-15-6(q). The May 28, 1996, decision relies upon Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994), which found that a lawyer-parent representing his child in IDEA proceedings is a *pro se* litigant and thus not entitled to attorney fees under the IDEA. The Rappaport court relied upon an analogous U.S. Supreme Court decision in Kay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435 (1991), which held that attorneys who are *pro se* litigants are not entitled to attorney fees in civil rights actions because "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under [42 U.S.C.] §1988." 111 S.Ct. at 1437-38.

The Indiana Supreme Court quoted extensively from Kay, 499 U.S. at 436-38, 111 S.Ct. at 1437-38:

> Although [the fee-shifting section] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.
>
> In the end...the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.
>
> A rule that authorizes awards of counsel fees to pro se litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Miller, 665 N.E.2d at 906-7.

For other Indiana cases involving or affecting attorney fees under IDEA, see:

1. Powers v. The Indiana Department of Education, 61 F.3d 552 (7th Cir. 1995), which began as a dispute over residential placement (Art. 7 Hearing No. 626-92). The 7th Circuit Court of Appeals upheld the district court's grant of summary judgment to IDOE because the parent's attorney did not timely request attorney fees. The parent, school and state successfully mediated the dispute. As a result, the parent withdrew her hearing request. The parent's attorney requested payment of her attorney fees, but IDOE declined, asserting that mediation is not an "action or proceeding" under IDEA, 20 U.S.C. §1415(e)(4)(B) because IDEA does not require mediation (although mediation is encouraged by a Note to 34 CFR §300.506). IDOE did not inform the parent's attorney of the right to seek judicial review or the limitations period for doing so. The parent's attorney did not file suit for attorney fees until seven months later. IDOE moved for summary judgment, arguing that the thirty (30) calendar day timeline for judicial review found at I.C. 4-21.5-5-5 should be applied to attorney fee requests arising out of administrative procedures subject to I.C. 4-21.5 (Administrative Orders and Procedures Act or AOPA). The 7th Circuit agreed that the thirty-day limitations period applies, but cautioned that such a short limitations period increases the responsibility of the public agency to inform parents and their attorneys of the short limitations period. Even though IDOE did not do so here, the parent's attorney offered no legal reason for her delay in seeking such fees through judicial review.

Recent decisions from other jurisdictions are upholding a shortened time period for IDEA

attorney fee requests because IDEA contemplates prompt resolution of all issues relating to the educational program of a student with disabilities. See Zipperer v. School Bd. of Seminole County, Fla., 891 F.Supp. 583 (M.D. Fla. 1995) and Andalusia City Bd. of Education v. Andress, 916 F.Supp. 1179 (M.D. Ala. 1996), both applying a thirty-day time period for IDEA attorney fees. But see Curtis K. by Delores K. v. Sioux City Comm. Sch. Dist., 895 F.Supp. 1197 (N.D. Iowa 1995), rejecting a thirty-day limitations period in favor of a five-year statute of limitations for "catchall" actions in Iowa.[3]

2. Powers left unanswered several questions which could not be addressed because of the untimely filing for fees: (1) Is mediation an "action or proceeding" under IDEA such that attorney fees can be awarded?, and (2) Is an attorney not licensed to practice law in Indiana entitled to "attorney fees"? As far as mediation, only two states have permitted attorney fees for mediation under IDEA. See E.M. v. Millersville Bd. of Education, 849 F.Supp. 312 (D. N.J. 1994) and Masotti v. Tustin Unified School Dist. Bd. of Ed., 806 F.Supp. 221 (C.D. Cal. 1992), both of which equated "mediation" with settlement. The court in E.M. noted that "Settlement and mediation are flip sides of the same coin, so that to rule out attorneys fees in one instance and not another would be incongruous." 849 F.Supp. at 315.

Whether or not an out-of-state attorney can claim attorney fees for practicing law in Indiana has likewise not been answered, but a recent Indiana Supreme Court decision may affect any future decision. In Powers, the attorney was licensed to practice in Illinois and not Indiana. So was the attorney in Matter of Fletcher, 655 N.E.2d 58 (Ind. 1995). Fletcher had been admitted *pro hac vice* as counsel for a defendent in an Indiana court. Fletcher knowingly made false statements to the court, and then tried to avoid disciplinary measures by claiming the Indiana Supreme Court had no jurisdiction. The Indiana Supreme Court disagreed, claiming jurisdiction "to protect the public against incompetent and unscupulous professionals." At 60. The Supreme Court defined the "practice of law" as the "giving of legal advice to a client" as well as developing a "sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." Id. In short, the "practice of law" is the giving of legal advice and legal counsel. Id.

In Powers, the parent's attorney would seem to have been engaged in the "practice of law" under the Flether definition. These were administrative proceedings, so she would not be required to seek permission of the court to proceed *pro hac vice*. An attorney

---

[3]The IDEA is currently undergoing reauthorization. The confusion in the courts is caused by the lack of any mention by congress of a statute of limitations. Each court, then, seeks the "most analogous" state statute which would give effect to legislative intent. In 1990 Congress did pass a general statute of limitations of four (4) years for actions pursuant to federal laws enacted after December 1, 1990, unless Congress determines a different time period. See 28 U.S.C. §1658.

representing a party in IDEA administrative procedures is not required to be admitted to the bar of the state where the dispute is. See Letter to Eig, EHLR 211:270 (OSEP 1980) and Virginia Department of Education, EHLR 257:349 (OCR 1982). Such a foreign attorney, however, who engages in the "practice of law" in Indiana is subject to disciplinary action by the Supreme Court.

For additional discussion of attorney fees in special education, see **Quarterly Report;** Jan.- Mar. 95; **Quarterly Report** July - Sept.: 95; **Quarterly Report** Jan. - Mar.: 96; **Quarterly Report** Apr. - June: 96; Recent Decisions, 9-10:86; and Recent Decisions, 1-12: 92.

INTERSTATE IEPs

Federal policy makers have been in agreement for some time that an individualized education program (IEP) developed for a student with disabilities has effect throughout the State where it was developed. States are required to ensure that the intrastate transfer of students with disabilities does not result in any interruption of services. Reiser, EHLR 211:403 (OSEP 1986); Campbell, EHLR 213:265 (OSEP 1989); Reynolds, EHLR 213:238 (OSEP 1989); Delmuth, EHLR 307:15 (OCR 1989); Recent Decisions 4-6:89, 8-9:87 and 1-2:87. However, the Office of Special Education Programs (OSEP) within the U.S. Department of Education declined to develop a policy on the legal effect of IEPs in interstate transfers. Nerney, EHLR 213:267.

Without specific guidance, Indiana determined that an interstate IEP must have some effect because it at least indicates a history of a disability as determined through a public agency in another state. An Indiana public agency receiving an interstate transfer student with an IEP could generally: (1) implement the foreign IEP as written, assuming Indiana requirements are met under 511 IAC 7-12-1(k); (2) treat the foreign IEP as an " interim IEP" and place the student in a diagnostic teaching evaluation placement under 511 IAC 7-3-16; or (3) place the student in general education classes while evaluating him for a suspected disability utilizing the procedures under 511 IAC 7-10-3. In any event, a case conference committee would be convened. It was because of the intrastate versus interstate IEP concern that 511 IAC 7-12-1(g) (5) was written to require that "[a] case conference committee shall convene...when a student who has been receiving special education elsewhere moves into the geographic jurisdiction of the public agency."

OSEP has finally issued a policy on interstate IEPs. OSEP Memorandum 96-5, 24 IDELR 320 (OSEP 1995). As a general premise, OSEP stated that a state receiving an interstate transfer is "not required to adopt the most recent evaluation and implement the most recent individualized education program (IEP) developed for the disabled student" by the previous state. However, the receiving state "must ensure that the rights of the disabled student and his or her parents are not compromised when an interstate transfer occurs."

Because education standards differ somewhat from state to state, OSEP recommends that school districts receiving interstate transfer students with IEPs do the following:

1. Ascertain whether the student's IEP and educational evaluation meet the receiving State's education standards.

2. If the evaluation and current IEP do meet state standards, the receiving school district could implement the IEP. It would not be necessary to convene another case conference committee (an IEP Team) if the IEP is current, is appropriate, and can be implemented as written.

3. If the receiving school district or the parent were dissatisfied with the current IEP, a case conference committee would have to be convened as soon as possible but no later than thirty (30) calendar days after the receiving school district accepted the foreign IEP.

4. If the receiving school district elects not to adopt the evaluation conducted by the student's former school district, the receiving school district "must evaluate the student without undue delay and provide proper notice to the parents." The evaluation by the receiving school district is to be treated as a "preplacement evaluation" requiring prior written consent of the parent.

5. While the evaluation is in process, the receiving school district could serve the student in a special education placement pursuant to an "interim IEP." This is a diagnostic placement. If the parent disagrees with a diagnostic placement, the student would be placed in general education classes until the evaluation is completed and the case conference committee convened to determine eligibility, develop an IEP, and determine placement. (Indiana incorporates these three responsibilities into one group.)

6. Should the parent disagree with the receiving school district's evaluation or IEP and requests a due process hearing, the student's "current educational placement" (or "stay put" placement) would not be pursuant to the foreign IEP. The "stay put" would be the placement which the parents and school agree to for the interim or in general education failing any other agreement. Under Indiana law, an Independent Hearing Officer can determine an interim placement as a preliminary matter at the request of a party. See 511 IAC 7-15-5(h), (i).

For other recent cases involving the legal effect of interstate IEPs, please see the following:

1. Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995). Parents challenged IEP and residential placement decisions made by an Arizona school district based upon evaluations and IEPs developed for the student in Idaho. "A school district may, without running afoul of the IDEA, rely upon the reports of another school district when developing its own IEP for a handicapped child so long as the information relied upon is still relevant." At 835.

2. Natchez-Adams School District v. Searing, 918 F. Supp. 1028 (S.D. Miss. 1996). Student moved from Texas to Mississippi with a Texas IEP requiring thirty minutes a week of occupational therapy (OT). The Mississippi school district adopted the Texas IEP (at 1031) with the intent to later revise the IEP. However, the parents enrolled the student in a private school. The school district refused to provide the OT services. A due process hearing officer found in favor of the parents. The school never revised the Texas IEP. As a result, the court found that the Texas IEP was still "in effect" and "the [Mississippi] school district is obligated to provide the related services recommended therein." At 1039.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The general requirement is that a plaintiff, before seeking judicial intervention, must first exhaust available administrative remedies. Under the Individuals with Disabilities Education Act (IDEA), this is specifically required. 20 U.S.C. §1415(e), I.C. 4-21.5-5-4. Failure to exhaust remedies can be excused where the plaintiff can prove that pursuit of such remedies would be futile or inadequate. Norris v. Greenwood Community School Corp., 797 F.Supp. 1452, 1467 (S.D. Ind. 1992).

This issue has arisen again in a number of jurisdictions as parties attempt to avoid IDEA administrative procedures. The most recent Indiana case is Smith v. Indianapolis Public Schools, 916 F.Supp. 872 (S.D. Ind. 1995). In Smith, the court dismissed the plaintiffs' claim because administrative remedies had not been exhausted. "Frustration" with the IDEA process is insufficient to excuse recourse to administrative due process procedures such that a court may exercise jurisdiction. The case is also interesting because it involves legal settlement (the parent enrolled the students in a township school for two years until it was discovered the parent resided within the IPS boundaries) and the effect of the notification of parental rights, as required by 511 IAC 7-7-1 and 511 IAC 7-12-1. In Smith, the court noted that IPS had documentation which the parent signed, indicating she had received "a notice of parent's rights" and that these rights had "been explained and offered in writing." At 874. See 511 IAC 7-12-1(n). The court found the plaintiff's contention that she was not fully informed as to her case conference committee and due process rights to be "without merit" because her signature indicates she was fully informed. At 877-78.

For other recent cases addressing the exhaustion requirement, please see:

1. Komninos v. Upper Saddle River Board of Education, 13 F.3d 775 (3rd Cir. 1994). The 3rd Circuit vacated a district court's dismissal of an IDEA claim and remanded, finding that exhaustion of administrative remedies can also be excused where there is an emergency or where the question is purely legal. In this case, if the plaintiff can demonstrate irreparable harm to the student will occur unless exhaustion of administrative remedies is not required, then an emergency exists which excuses such recourse. "Irreparable harm" means the student "will suffer serious and irreversible

mental or physical damage (e.g., irremediable intellectual regression)..." At 779. Mere allegations or possible regression are insufficient. At 779-80.

2. Lemon v. District of Columbia, 920 F.Supp. 8 (D. D.C. 1996). The court dismissed plaintiffs, who sought certification as a class to challenge the District of Columbia's IDEA procedures. The court noted (1) the plaintiffs did not exhaust their administrative remedies, (2) the plaintiffs offered no reason why such remedies should not be exhausted, and (3) a court cannot assume jurisdiction in such a matter until the IDEA administrative procedures are completed.

STRIP SEARCHES: PUPIL DISCIPLINE

Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) is the latest decision addressing "strip searches" of students by school personnel. In this case, the plaintiffs were seventh grade female students attending middle school. Shortly before the end of a physical educaiton class, two other female students reported $4.50 missing from the locker room. The principal, who is male, with the assistance of a substitute teacher and food service worker, both female, checked the students' lockers, bookbags and shoes. The adult females eventually checked the girls' bras to determine whether the money was hidden there. This search required the students to undress somewhat, while the female adults checked the garments and waist bands. Some pockets were patted down. The principal later that day felt the latter search was too excessive. He contacted the parents of the affected students and explained what occurred. He also apologized.

The court, following New Jersey v. T.L.O., 469 U.S. 325, 333, 105 S. Ct. 733, 738 (1985), reiterated that the Fourth Amendment prohibition against unreasonable searches and seizures does apply to searches conducted by school officials but not to the same degree as other searches. The Supreme Court established a "twofold inquiry" to determine whether a search is reasonable:

1. The search must be "justified at its inception" (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and

2. The search must be "reasonably related in scope to the circumstances which justified the interference in the first place."

In addition, "such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search *and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."* T.L.O., 469 U.S. at 342, 105 S. Ct. at 743. (Italics added by district court. Oliver, 919 F.Supp. at 1217.)

Prior to T.L.O., the 7th Circuit had addressed the constitutionality of strip searches of students. In Doe v. Renfrow, 631 F.2d 91, 92-3 (7th Cir. 1980), reh. den. 635 F.2d 582 (1980), cert. den.

451 U.S. 1022, 101 S.Ct. 3015 (1982), the 7th Circuit addressed a suspicionless "strip search" of students in search of contraband at an Indiana public school.

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law." (Quoting Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 1000 (1975).

Justice John Paul Stevens in T.L.O., in a separate opinion concurring in part and dissenting in part, wrote that "to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm." T.L.O., 469 U.S. at 383, 105 S.Ct. 764, n. 25. The district court in Oliver noted that strip searches of students have generally been upheld where there was "a threat of imminent harm" from drugs or weapons. In this case, however, the theft of $4.50 is not such a threat to anyone such that the "strip search" could be justified.

The following are recent "strip search" cases involving students.

"Strip Search" Justified

1. Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), cited extensively in Oliver v. McClung, *supra*, involved a "strip search" of a 16-year-old student suspected of "crotching" drugs. The student had a history of behavioral problems, and had been observed earlier outside the school building without permission. The student had a history of drug use and abuse. He had an unusual bulge in the crotch area of his sweatpants. The student, when confronted with this suspicion, began shouting obscenities. The parent was contacted for permission to search the student, but the parent refused. Nonetheless, a male teacher and male administrator escorted the student to a locker room where he was required to disrobe and put on a gym suit. No body cavity was searched, nor were any drugs discovered. The 7th Circuit, viewing the "strip search" in its context, noted:

   a. A nude search of a student by an administrator or teacher of the opposite sex would obviously violate [the] standard [of reasonableness]." At 1320.

   b. A "highly intrusive search in response to a minor infraction would similarly not comport... with the T.L.O. standard of reasonableness. Id.

   c. Age is a relevant factor in evaluating the reasonableness of a search. At 1321.

d. "[A]dolescents are generally presumed to be as capable of independent criminal activity as adults." Id.

The court found sufficient individualized suspicion and reasonable cause, given the age of the student, his history of behavioral problems including drug use, the unusual bulge in his crotch area, and the fact the student was not touched or subjected to unnecessary indignities beyond disrobing and putting on a gym uniform. This is contrasted with Doe v. Renfrow where the "strip search" was without any individualized suspicion and without reasonable cause. At 1324.

"Strip Search" Unjustified

2. State Ex Rel. Galford v. Mark Anthony B., 433 S.E.2d 41 (West Va. 1993). The student, who had a history of theft-related convictions, was suspected of stealing $100 from a teacher's purse. The principal, without a witness, took the student into the restroom and looked into the student's socks and pockets, and had the student pull down his pants and underwear. The $100 was in his underwear. In subsequent delinquency proceedings, the student sought to suppress the "strip search" evidence but the court declined to do so. As a result, the student accepted a guilty plea. The following is instructive.

   a. The West Virginia Supreme Court defined "strip search" as involving " a visual inspection of an individual's body, including areas of the body which are usually hidden by undergarments." At 45.

   b. "Looking inside of a student's underwear is an invasion of personal privacy that should not be equated with searching a student's locker or other personal possessions." At 48.

   c. Stealing money does "not pose the type of immediate danger to others that might conceivably necessitate and justify a warrantless strip search." At 49.

   d. "[I]n the absence of exigent circumstances which necessitate an immediate search in order to ensure the safety of other students, a warrantless strip search of a student conducted by a school official is presumed to be 'excessively intrusive' and thus unreasonable in scope." Id.

PUPIL DISCIPLINE STATUTE VS. JUVENILE JUSTICE STATUTE

On May 15, 1996, the Indiana Court of Appeals issued In the Matter of H.L.K., 666 N.E.2d 80 (Ind. App. 1996), which continues an appellate dispute regarding the supremacy of legislative enactments involving school attendance and pupil discipline.

H.L.K. , while attending Borden Junior High School in West Clark Community Schools during May 1995, placed rat poison in the soft drink of a boy who allegedly was sexually

harassing her. The boy learned of her intentions and did not drink the soft drink. The juvenile court obtained jurisdiction in May 1995, and placed her in the custody of the Clark County Youth Shelter. H.L.K. admitted to the commission of a delinquent act. On June 9, 1995, the juvenile court held a dispositional hearing, during which time H.L.K. was placed in custody of her aunt and ordered to serve one year of probation. One condition of her probation was "to attend school regularly with no absences or tardies" and to "work to the best of your ability and conduct yourself according to school policy." At 82.

While delinquency proceedings were occurring, the school moved to expel H.L.K. for the first semester of the 1995-96 school year, effective August 24, 1995. The timing is important to the Court of Appeals because of its previous decision (discussed below) and the July 1, 1995, effective date of I.C. 20-8.1-5.1, the new pupil discipline statute superseding I.C. 20-8.1-5, which was in effect when the attempted poisoning occurred.

Previous Decision

The Court of Appeals, by 2-1 (Judge Baker dissenting), earlier decided In the Matter of P.J., 575 N.S.2d 22 (Ind. App. 1991), which involved a nearly identical question of legislative preeminence between the statutory authority of a juvenile court and the statutory authority of a school corporation. P.J. involved a "child in need of services" (CHINS) who was expelled from school for consuming alcoholic beverages on school grounds. When confronted, the student advised school officials she was being sexually molested. The school reported the suspected abuse, which resulted in the conviction of the student's father. The school moved to expel P.J. under the pupil discipline law then in effect (I.C. 20-8.1-5 et seq.), but the juvenile court, which had jurisdiction under the CHINS statute, enjoined her expulsion. Although the Court of Appeal's decision references expert testimony that a child will sometimes engage in outrageous conduct as an avenue to cope or reveal traumatic occurrences, the court was not addressing procedural or substantive due process questions but whether a juvenile court could enjoin a school corporation's expulsion. The court found that the statutory authority at I.C. 31-6-7-14 (a)(1), (d), permitting a juvenile court to issue an order "to control the conduct of any person[4] in relation to the child," was enacted more recently than the pupil discipline statute and was, therefore, a more recent expression of legislative intent. P.J., 575 N.E.2d at 25. The legislative intent was to grant the juvenile court the authority to enjoin a school's expulsion where the juvenile court had exclusive original jurisdiction, even where administration remedies had not been exhausted.

In H.L.K., the court, also by 2-1 (Judge Staton dissenting), reversed P.J., or rather the court determined the legislature did so when it enacted I.C. 20-8.1-5.1. At 84-85. The court noted that I.C. 20-8.1-5.1-15 severely limits a court's judicial review of a school corporation's expulsion determination to a review of whether the school followed statutory procedures.

---

[4]"Person" is defined at I.C. 31-6-1-24 as "a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity."

Since this is now the most recent expression of legislative intent and failure to follow correct procedures was not at issue, the juvenile court was without authority to issue a permanent injunction.[5]

The dissent noted the juvenile court obtained jurisdiction prior to the school's decision to expel. The dissent also claimed the majority opinion "utterly destroys the remedial ability of the juvenile court to deal with critical problems requiring the cooperation of others by an order of the court." At 85.

The dissent also lamented that the court continues to pit one statute against another rather than seeking to harmonize the provisions. The statutes in question -- I.C. 31-6-7-14 and I.C. 20-8.1-5.1 -- are reconcilable. I.C. 20-8.1-5.1-15.5 permits a court to issue a temporary restraining order regarding an expulsion order of a school (although this injunctive relief is limited to a court upon judicial review). Nonetheless, the dissent would have upheld the juvenile court because it had jurisdiction prior to the school's decision to expel. At 86.[6]

For another Indiana case addressing relative roles of juvenile courts and educational decision making, see In Re E.I., 653 N.E.2d 503 (Ind. App. 1995). The court ordered a residential placement under CHINS for a severely autistic boy, and ordered several state agencies, including the Indiana Department of Education, to fund the placement. IDOE appealed because the court could not exercise jurisdiction over IDOE in this manner, particularly where the dispute was not related to education, administrative avenues had not been sought much less exhausted, and there was no showing such administrative remedies would be futile or inadequate. The Court of Appeals reversed, finding that the costs, by statute, are to be borne by the county and not the state, including IDOE. (Incidentally, an application for alternative services had been completed by E.I.'s school corporation of legal settlement and filed with IDOE under 511 IAC 7-12-5, I.C. 20-1-6-19. The application was approved, and alternative services were provided notwithstanding the juvenile court's actions.)

---

[5]Nonetheless, the juvenile court was not reversed nor was the mater remanded because the student had remained in school and had satisfied the terms of her probation. The issue as to H.L.K. was moot. The court reviewed this "under a public interest exception which may be invoked when the case involves a question of great public importance which is likely to recur." At 83.

[6]For another recent poisoning case, see State of Tennessee v. Reeves, 916 S.W.2d 909 (Tenn. 1996), upholding the delinquency adjudication of a 12-year-old girl in middle school who, with another 12-year-old girl, attempted to put rat poison in the coffee cup of her homeroom teacher and steal the teacher's car.

TEACHER LICENSE REVOCATION AND SUSPENSION

The Indiana Professional Standards Board (IPSB) addressed an interesting issue this past year: Where a license revocation action has been initiated by the State Superintendent of Public Instruction under I.C. 20-6.1-3-7(a), is the IPSB limited to consideration of revocation only?

The IPSB, in In the Matter of L.A.N., Cause No. 940826074 (IPSB 1995; Susan K. Straw and Kevin C. McDowell, Administrative Law Judges), determined that a revocation action by the State Superintendent invoked the jurisdiction of the IPSB but did not limit its remedial considerations (see Attachment E).

The respondent teacher pled guilty to a Class D felony for attempted possession of cocaine, but was sentenced as a Class A misdemeanant. As noted in Recent Decisions 1-12:94, amendments to 515 IAC 1-2-18(b)(3) effective January 15, 1994, permit revocation of a teacher license for misdemeanor convictions as well as felony convictions so long as the conduct constitutes either immorality, misconduct in office, incompetency, or willful neglect of duty. I.C. 20-6.1-3-7(a). The regulation refers to "crimes of moral turpitude" and includes "drug related offenses." The teacher, however, presented credible and persuasive testimony from colleagues and peers regarding his fitness and character, acknowledged the error, and explained adequately mitigating circumstances of an extreme nature which resulted in his conviction. The IPSB found that revocation under these circumstances would be too punitive a measure, 515 IAC 1-2-18(j), and elected instead to suspend the teacher's license "for a period not to exceed two (2) years," as provided by 515 IAC 1-2-18(c). His license will be reinstated at the end of the suspension upon written request.

This decision is important in several respects:

1. A revocation action must be initiated by the State Superintendent of Public Instruction, but the IPSB is not limited to revocation consideration only. The State Superintendent's action is based upon a preliminary investigation by the State Superintendent's legal staff and is not a hearing procedure. Statute requires a hearing to be conducted pursuant to the Administrative Orders and Procedures Act, I.C. 4-21.5-3. See I.C. 20-6.1-3-7(a).

2. The Division of Teacher Certification of the IPSB could have initiated a suspension action on its own under I.C. 20-1-1.4-7(a)(4). The State Superintendent's authority to suspend a teacher's license is limited to nonprofessional conduct of a teacher who cancels an indefinite contract in a manner not permitted by law. See I.C. 20-6.1-4-13(b) and I.C. 20-6.1-3-7(c). The State Superintendent may suspend a teacher's license for not more than one (1) year for this infraction, but this suspension is not a function of the IPSB and is not the type of suspension contemplated by I.C. 20-1-1.4-7(a)(4). There is no known instance where the State Superintendent has ever done so, however.

3. Under 515 IAC 1-2-18(c), the IPSB could suspend a teacher's license for up to two years.

Even though the IPSB suspended the license of L.A.N. for two years from the date of its decision, it could have suspended his license for any amount of time so long as the sanction did not exceed two years.

4. While the IPSB may suspend a teacher license although the proceedings began as a revocation, the IPSB could not revoke a license where the proceeding began as a suspension. The State Superintendent cannot initiate a suspension before the IPSB, and the IPSB cannot initiate a revocation.

FITNESS TO TEACH: COMPLETION OF PROBATION

A petitioner to hold a teacher license should not request a fitness hearing under 515 IAC 1-2-18(g) until he has completed the terms of his probation. In the Matter of D.L.D., Cause No. 950601082 (IPSB 1995; Philip L. Metcalf and Risa A. Regnier, Administrative Law Judges).

D.L.D., as a result of a neck injury, became addicted to prescription drugs. He was convicted twice on felony charges for forging prescriptions. He sought a substitute teaching license from the IPSB, who directed him to undergo a fitness hearing. A fitness hearing is required under 515 IAC 1-2-18(g) while the seven standards for demonstrating fitness are found at 515 IAC 1-2-18(h). See Attachment F.

Even though D.L.D.'s professional qualifications would otherwise entitle him to a five-year substitute teacher certificate under 515 IAC 1-2-17(e), he was still on probation for approximately nine months on his first conviction and on Home Detention for another year for the second conviction. While the IPSB noted the strides D.L.D. had made, consideration of fitness to teach was premature. "Evidence of rehabilitation," as provided under 515 IAC 1-2-18(h)(7) includes successful completion of one's sentence for a criminal conviction, including completion of the terms of probation.

For other cases affecting teacher license revocation or suspension, please see the following:

1. Ulrich v. State of Indiana, 555 N.E.2d 172 (Ind. App. 1990), reh. den. Teacher's license was revoked for immorality and misconduct in office following his conviction for raping a former student. His rape conviction was reversed because of improper procedure by the trial court. Ulrich v. State of Indiana, 550 N.E.2d 114 (Ind. App. 1990). Notwithstanding the reversal of his conviction, a transcript of the victim's testimony from the trial describing the rape was sufficient evidence of the teacher's immorality and misconduct in office to sustain revocation of his teacher license.

2. Nanke v. Pennsylvania Department of Education, 663 A.2d 312 (Pa. Cmwlth. 1995). The court affirmed revocation of the teacher's public educator certificates for falsifying applications, misrepresenting credentials, and forging signatures. The teacher was never convicted of any crime, but the Professional Standards and Practice Commission found her conduct constituted "immorality," which it defines as "conduct which offends the

morals of a community and is a bad example to the youth whose ideals a professional educator has a duty to foster and educate." No conviction was necessary for an action by a teacher to constitute "immorality" for the purpose of revoking her teacher certificate.

3. Falgren v. Minnesota Board of Teaching, 545 N.W.2d 901 (Minn. 1996). The Minnesota Supreme Court reversed the Court of Appeals, reinstating the revocation of Falgren's teacher license for nonconsensual sexual contact with a student. When first charged by the school district, Falgren requested the proposed termination be submitted to a neutral arbitrator rather than the governing body. Following four days of testimony, the arbitrator's recommendation was against the teacher and he was dismissed. The Minnesota Board of Teaching then sought to revoke his teaching license, moving for summary disposition based upon the determinations of the arbitrator. The Board applied "offensive collateral estoppel" to prevent Falsgren from relitigating the factual matters already determined by the arbitrator. The Minnesota Supreme Court found that the ultimate fact--whether the nonconsensual sexual contact with a minor student occurred--was determined by a process elected by the teacher. This discharge determination is precluded from relitigation. The court also found that the arbitration proceedings incorporated all basic hearing rights such that the teacher was not denied due process or treated unfairly by the Board of Teaching's application of "offensive collateral estoppel" in finding against him and revoking his license.

SCHOOL BUS DRIVERS AND THE AMERICANS WITH DISABILITIES ACT

Attachment G is a complaint investigation report resulting from allegations that the Indiana Department of Education discriminated on the basis of disability against a school bus driver who lost her position following amputation of her left leg below the knee. At issue are the requirements of I.C. 20-9.1-3-1(g)(2) which establish fitness standards, mental and physical, for school bus drivers in Indiana. Although IDOE did not employ the complainant and has no authority to waive the statute in question, the complaint investigator added a discussion section which cautions against a strict, literal application of the statutory language. The statutory language needs to be applied in light of the requirements of the Americans with Disabilities Act regarding whether one is a "qualified individual with a disability" who could safely perform the essential functions of the position. Such determinations are to be made on a case-by-case basis.

This case-by-case analysis is reinforced by a recent decision in Weatherbee v. Indiana Civil Rights Commission, 665 N.E.2d 945 (Ind. App. 1996). Weatherbee was an unsuccessful bidder for a school bus route. Although her bid was the lowest one, it was rejected because her application indicated she had epilepsy and has had blackouts and seizures, although medication seemed to control the seizure activity. The Indiana Civil Rights Commission found the school corporation had discriminated against Weatherbee on the basis of her disability, but the trial court reversed. The Court of Appeals affirmed the trial court. The Court held that "the prohibition against discrimination in employment because of handicap does not apply to the

failure of an employer to employ a person who because of a handicap is physically or otherwise unable to perform the duties required in a job efficiently and safely, at the standards set by the employer." At 948.

The Court added at 949 that "the awarding of contracts to transport school children is not a purely ministerial act but requires the exercise of discretion or judgment in ascertainment of the lowest responsible bidder." In this matter, the school corporation was justified in refusing to accept her bid because there was "a reasonable probability of substantial harm to school bus passengers and others." At 950.

However, the Court clarified that it does not intend to have its decision applied beyond its facts.

> In arriving at this decision, we do not mean and do not hold that all persons diagnosed with epilepsy are per se incapable of safely operating a school bus. An assessment of whether or not a particular disabled person can safely perform a job involves a case-by-case analysis of the applicant's limitations in relation to the particular job requirements.

Id. The school corporation had a legitimate, nondiscriminatory motive for refusing Weatherbees's bid. Her application "failed to establish that her epileptic condition was under control and that, with medication, she was reliably asymptomatic." Id.

SCHOOL BUS LETTERING AND IDENTIFICATION: COMMERCIAL MESSAGES

The State School Bus Committee (see I.C. 20-9.1-4) had a number of interesting issues this past year. One issue involved an attempt to encourage the State School Bus Committee (SSBC) to expand the permissible scope of lettering and identification for school buses. Current regulations are specific with few variations. In fact, the SBCC has approved only five variations while disapproving of 12. At issue this past year was whether the SBCC should authorize the use of external decals, bumper stickers or other means which would convey a commercial message. The SBCC requested a legal opinion from IDOE. The opinion cautioned against such advertisements on school buses for safety reasons and constitutional concerns. The constitutional concerns involve Equal Access claims under the First Amendment by the creation of limited public forum on the outside of a school bus. "Speech," for First Amendment analysis, can be personal, commercial, political, or artistic. In any event, once a school corporation creates a public forum for speech, even a limited one, it becomes increasingly difficult to reject the "speech" of others without engaging in content-based or viewpoint-based discrimination. In brief, a school corporation may not be able to restrict the "commercial" messages from those

wishing to gain access to the limited public forum. The SBCC declined to expand its rules to permit commercial messages.

The legal opinion referenced above is available upon request as R.D. Document #13.

August 23, 1996
Date:

Kevin C. McDowell, General Counsel

Indiana
State Board of Education

Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

Before the Indiana
State Board of Education
Cause No. 9410026

In Re A.S.C.	)	
and J.F.O., Petitioners	)	Findings of Fact,
	)	Conclusions of Law,
Legal Settlement Dispute	)	and Order
under I.C. 20-8.1-6.1 involving	)	
Tippecanoe School Corporation, Respondent	)	

Procedural History

Both the petitioners and the respondent have vigorously and ably presented their cases. The facts are remarkably not in dispute, but the legal conclusions vary widely. These facts are of first impression to the Indiana State Board of Education, and involve exclusion proceedings of two students based upon contested legal settlement. The school-based proceedings under which this dispute began were repealed by the 1995 General Assembly. I.C. 20-8.1-5-5(2), repealed by P.L. 131-1995, §12.

The Indiana State Board of Education has administrative appellate jurisdiction under I.C. 20-8.1-6.1-10, this jurisdiction undisturbed by the 1995 General Assembly. The procedural history before the State Board is as follows:

October 31, 1994. Petitioners, by counsel, sought direct appeal to the State Board, alleging that pending school-based exclusion proceedings would be futile and unavailing. Petitioners asserted the school corporation had a predetermined outcome.

November 4, 1994. Respondent school corporation, by counsel, filed its objection to the State Board assuming jurisdiction prior to the completion of local exclusion proceedings under the statute then in force.

November 7, 1994. Petitioners, by counsel, responded to the respondent's objections and sought a protective order to prevent the deposing of petitioners by the respondent.

November 9, 1994. The State Board of Education assigned a hearing examiner who, by Notice of Appointment and Preliminary Orders of that same date, followed by a letter to counsel of record, denied Petitioners' Motions for a hearing before the State Board and for a protective

Attachment
A

11 pp.

orders. The hearing examiner did accept all pleadings filed but permitted the school-based proceedings to continue. The hearing examiner also indicated the students could not be excluded from school until all administrative proceedings are exhausted.

January 5, 1995. The hearing examiner received the school-based hearing examiner's written report finding in favor of respondent and against petitioners. The school-based hearing procedures provided for an appeal to the governing body.

January 13, 1995. Petitioners appealed the school-based hearing examiner's decision to the local governing body.

March 9, 1995. The hearing examiner requested a status report from counsel of record.

March 14 and 15, 1995. Both counsel responded, indicating oral argument was conducted before the local governing body on February 8, 1995, and a decision was expected soon.

April 12, 1995. The local governing body, by a 5-1 vote, upheld the local hearing examiner's decision in favor of respondent and against the petitioners.

April 19, 1995. Petitioners appealed the adverse local decision to the State Board of Education. Petitioner requested a *de novo* hearing.

April 24, 1995. Respondent, by counsel, filed its objection to a hearing *de novo*, asserting the record was extensive and sufficient for the State Board to review and decide the matter.

May 2, 1995. The hearing examiner set this date for a telephonic prehearing to discuss petitioners' motion and the respondent's objection.

May 3, 1995. The hearing examiner reset the prehearing for this date following a scheduling conflict by one of the counsel.

May 9, 1995. The hearing examiner received the written opinion of a board member for the local governing body, dissenting from the majority's decision to uphold the decision of the local hearing examiner.

May 15, 1995. The hearing examiner reset the prehearing for May 16, 1995, following a scheduling conflict by the other counsel of record.

May 16, 1995. The hearing examiner conducted a telephonic prehearing conference and issued a written prehearing order that same day, denying the petitioners' motion for a hearing *de novo*, directing respondent to file the record with the State Board, and indicating that oral argument will be scheduled following receipt and review of the record.

May 18, 1995. Respondent, by counsel, requested clarification regarding one part of the

prehearing order. By letter to the parties, the hearing examiner explained that the issue of legal settlement would be determined on the facts as these relate to these Petitioners and not on what may have occurred in other circumstances not involving these petitioners.

May 22, 1995. The respondent filed the record with the State Board. The hearing examiner notified counsel of record on May 25, 1995, that the record had been filed.

July 6, 1995. The hearing examiner advised the parties that the issue is whether or not petitioners have legal settlement. The parties were advised to provide the hearing examiner with available dates for oral argument.

July 27, 1995. The hearing examiner advised the parties that oral argument would be conducted on August 29, 1995, in Room 225, State House. This was rescheduled from August 17, 1995, at the request of the hearing examiner for medical reasons.

August 29, 1995. Counsel appeared and presented argument. The presentation of oral argument was ruled an open proceeding at the request of the petitioners. Electronic media were present and did record the arguments.

Although under I.C. 20-8.1-6.1-10(c) such matters are not governed by I.C. 4-21.5 (Administrative Orders and Procedures Act), because legal settlement disputes before the State Board are not hearings but administrative reviews (appeals), the hearing examiner advised the parties he would apply the review standards found at I.C. 4-21.5-5-14(d). To reverse a decision under these standards, there must be a showing that the written decision is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial law.

Neither party objected to the hearing examiner employing these standards.

School-Based Hearing Examiner's Decision

Because it is the Findings and Conclusions of the school-based hearing examiner which are under review, his Findings and Conclusions, including recommendations, are reproduced below:

Findings and Conclusions

On the basis of the relevant and material evidence presented at the hearing, I make the following findings:

1. In late summer 1994, around the first part of August, [A.C.] and [J.O.] came to Lafayette to participate in the Colt World Series as members of a baseball team representing Puerto Rico. For about nine (9) days, [A.C.], [J.O.], and one (1) other team member stayed in the home of Mr./Mrs. John Basham II who have hosted other CWS participants in prior years.

2. Near the conclusion of the tournament, [A.C.] and [J.O.] asked if they could return to Lafayette and live with the Bashams. Mr./Mrs. Basham agreed to their request on the condition that both boys would have to get their mother's permission. [A.C.] and [J.O.] then returned to their homes in Puerto Rico along with other members of the baseball team.

3. About the middle of August, 1994, and near the beginning of the school year in Tippecanoe School Corporation, [A.C.], then [J.O.] two (2) or three (3) days later, returned to Lafayette and the Basham home at 1450 W. 500 S. This address is within the boundaries of Tippecanoe School Corporation and the McCutcheon H.S. district.

4. After [A.C.] returned and before [J.O.] arrived, Mrs. Basham initiated enrollment procedures at McCutcheon H.S. for both boys. She told Principal Bauer that she and her husband, John, intended to get legal guardianship of [A.C.] and [J.O.]. Principal Bauer referred Mrs. Basham to T.S.C.'s Central Office to ensure that admission requirements were being satisfied.

5. Following [J.O.'s] return, Mrs. Basham took both boys to Central Office and met with Arnold Mills, Director of Student Services. Mr. Mills remembered that Mrs. Basham had contacted him approximately two (2) years ago under similar circumstances. He told Mrs. Basham that legal settlement issues would have to be resolved and that a legal guardianship for educational reasons is no longer allowed in Indiana. Mr. Mills stated that he would review the matter, talk with Superintendent Wood, and then contact Mrs. Basham.

6. Apparently, later that same day, Mrs. Basham contacted Gaylon Nettles, State Attendance Officer for the Indiana Department of Education. She informed Mr. Nettles that she and her husband were initiating legal guardianship procedures for [A.C.] and [J.O.] and having problems getting the boys enrolled at McCutcheon H.S. Mr. Nettles told Mrs. Basham about a state administrative rule requiring children in Indiana thirty (30) days or longer to attend school, and advised Mrs. Basham that a legal guardianship would give the boys legal settlement for purposes of attending school tuition-free.

7. The following day, Mrs. Basham, [A.C.], and [J.O] met with Dr. Richard D. Wood, Superintendent. During this meeting, Dr. Wood explained his concern about the legal

settlement issue. He cited his embarrassment upon learning last spring that another minor ward of the Basham's was attending school tuition-free at the same time as he (Dr. Wood) had denied tuition-free attendance to other students wanting to go to T.S.C. schools. Mrs. Basham told Dr. Wood of her telephone conversation with Mr. Nettles and her understanding of the law. Dr. Wood promised that he would consult with the corporation's attorney and then contact Mrs. Basham as soon as possible.

8. Within two (2) to three (3) hours after the meeting and before any further communication between Dr. Wood and Mrs. Basham, both of the following events occurred:

a) A telephone conversation between Mr. Mills and Mr. Nettles wherein the compulsory school attendance law was discussed and Mr. Nettles advised that if T.S.C. challenged legal settlement it must be done in accordance with the student due process statute; and

b) Mrs.. Basham took [A.C.] and [J.O.] to McCutcheon H.S., completed school enrollment forms, requested placement and class schedule information, and met with Principal Bauer. Mrs. Basham expressed her unhappiness and frustration with what was occurring and Mrs. Bauer explained that the boys were provisionally enrolled until legal settlement issues could be resolved with appropriate investigation and documentation.

9. After their enrollment, [A.C.] and [J.O.] have attended school regularly, have not been a discipline problem, and have provided special tutorial assistance, and seemingly have adjusted to the social interaction of students at McCutcheon H.S.

10. There was no further communication between the school and the Bashams regarding [A.C.] and [J.O.]'s attendance until Principal Bauer's letter dated August 25, 1994. In her letter to Mr./Mrs. Basham, Principal Bauer requested documentation to assist in making a legal settlement determination, and indicated what the options would be if [A.C.] and [J.O.] were attending school for educational purposes only.

11. No response to Principal Bauer's letter was made or received. So, on September 8, 1994, Mr. Mills sent a letter to the Basham's requesting documentation to support the position that [A.C.] and[J.O.]'s enrollment was not for educational reasons alone. Further, he requested that the information be submitted by September 23, 1994.

12. On September 12, 1994, Mrs. Basham wrote a letter to Mr. Mills indicating that legal guardianship proceedings had been initiated by their attorney, Randall Vonderheide. In this letter, Mrs. Basham went on to say that if the school persisted in trying to collect tuition or exclude [A.C.] and [J.O.] from attending McCutcheon H.S., she would be supported by many people. Additionally, she explained her role as "Mom" and the humanitarian efforts she was making based on her Christian beliefs.

13. On September 15, 1994, Mrs. Basham sent letters to T.S.C. Board members and to the Indiana Department of Education (Mr. J. Ray [Roy] - Staff Attorney, and Mr. Nettles).

a) In her letter to Board Members, Mrs. Basham criticized the actions of Dr. Wood, gave her account of the meetings with Mr. Mills and Dr. Wood, and described the family circumstances in Puerto Rico of [A.C.] and [J.O.].

b) In the letter to Messers. Ray [Roy] and Nettles, Mrs. Basham alleged that "Something is 'rotten in Denmark',..." and that her attorney would be contacting them.

14. On September 14 and 19, 1994, Judge Ronald E. Melichar, Tippecanoe Circuit Court, signed orders appointing Mr./Mrs. Basham as guardians of [J.O.] and [A.C.], respectively. Copies of these documents were delivered to Asst. Principal Douglas J. Patterson at McCutcheon H.S. by Mrs. Basham.

15. Prior to and in preparation for filing her charges and request for exclusion of [A.C.] and [J.O.], Principal Bauer took the following actions:

a) conferred with other T.S.C. administrators including Dr. Wood, Mr. Mills and Mr. McGlone;

b) talked with Gary Longest, [A.C.] and [J.O.]'s guidance counselor;

c) reviewed school records and other information which were available for [A.C.] and [J.O.];

d) made several calls to the boys' previous schools in Puerto Rico to obtain more information;

e) reviewed the guardianship papers for both [A.C.] and [J.O.]; and

f) read the legal settlement statute.

16. After receiving notice of the charges and the rights to a hearing, Mrs. Basham once again sent a letter to T.S.C. Board Members on October 5, 1994. In this letter, Mrs. Basham expressed her views about the school's actions, the requirements of law, the advice received from the Indiana DOE, and threatened to file suit if the Hearing Examiner found for exclusion. She additionally stated that news media from around the state and Chicago would be present before, during, an after the hearing.

17. Transcripts for both [A.C.] and [J.O.] show that both boys have attended schools in Puerto Rico for several years. Contact with these schools by personnel at McCutcheon H.S. has provided only confirmation that the boys were students there. It should be noted

that only one (1) school provided any response to the notice of these proceedings and that response gave no relevant information.

18. Prior to the initiation of these exclusions proceedings, the only additional information or documentation available to the school were the guardianship papers showing that the natural parents of both boys had given their consent; and the informal comments made by the boys to Mr. Longest and Mrs. Hemmer about their families, living conditions, and schools in Puerto Rico, and their hopes to possibly go to college here.

19. Subsequent to the start of these proceedings and during the course of this hearing, Mr./Mrs. Basham have clearly stated their desire to provide a better family situation for both boys; and, in news media interviews, [A.C.] and [J.O.] have indicated they want to go to school here, possibly attend college, and have a better life than what they can have in Puerto Rico.

20. Approximately two (2) years ago, Mr./Mrs. Basham obtained guardianship of three (3) other boys from Puerto Rico who came here under circumstances similar to [A.C.] and [J.O.]. One (1) of these, O.A., remains in the Basham home and attends McCutcheon H.S. on a tuition-free basis.

Based upon all of the foregoing findings and evidence, I conclude that: a) after a brief visit to the Lafayette area, [A.C.] and [J.O.], with their parents' permission, voluntarily returned to attend school in hopes of having a better life here than in Puerto Rico; b) Mr./Mrs. Basham have provided a comfortable home and living conditions for both boys just as they have for several others and have secured legal guardianship of the boys; c) the basic presumption of the legal settlement statute (I.C. 20-8.1-6.1-1) is that a student is entitled to attend school tuition-free in the school district where the student's parents reside, however legal settlement may be changed if a legal guardianship is not primarily for purposes of attending school where the guardians reside; d) McCutcheon H.S. has reasonable cause to challenge, investigate, and seek a determination of legal settlement for purposes of making the students' admission to school either tuition-free or subject to the payment of tuition charges; e) the procedures required by statute to make determinations of legal settlement (I.C. 20-8.1-5-5 and 20-8.1-5-8 et seq.) have been and are being followed here; and f) while the basic facts in this matter are not in dispute, the parties' interpretations and application of the law are in dispute.

Recommendations

Recognizing that the students and their guardians have already filed preliminary pleadings with the State Board of Education, I recommend that the Superintendent make the following determinations with respect to the proposed exclusions of [A.C.] and [J.O.]:

1. The following conditions exist with respect to the attendance of [A.C.] and [J.O.] in the schools of Tippecanoe School Corporation:

a. no transfer has been granted or ordered by the State Board of Education;

b. no agreement has been made for the payment of cash tuition; and

c. no governmental entity is obligated to pay transfer tuition.

2. In the absence of any of the statutory conditions found at I.C. 20-8.1-5-5 and appropriate documentation of the purposes for school attendance to be other than primarily for educational reasons, as required by I.C. 20-8.1-6.1-1, exclusion is necessary.

3. Students are and will continue to be permitted to attend McCutcheon H.S. until an appeal to the State Board of Education determines the question of exclusion as ordered by ALJ Kevin C. McDowell.

The superintendent reviewed the decision and concurred with it on January 4, 1995.

[End of Decision]

As noted above, the local governing body, by a 5-1 vote, upheld the local hearing examiner's decision. The governing body member voting against the local decision wrote a dissenting opinion which was not forwarded with the record. Petitioners' counsel provided a copy to the hearing examiner.

Neither party has taken exception to any of the factual determinations by the local hearing examiner. Although the State Board hearing examiner finds some of the factual determinations irrelevant, these are admitted nonetheless in their original form and are considered Findings of Fact for the purpose of this review. However, the local hearing examiner's recommendation No. 1 is irrelevant in that transfer tuition was not at issue.

The local hearing examiner's recommendation No. 2, finding that the guardianship was established primarily for educational reasons, is reversed. There exists no evidence to support this recommendation. All credible evidence supports the opposite conclusion. Furthermore, the local hearing examiner and the local governing body lack the authority to attack a judicial decree which, on its face, does not establish guardianship primarily or for the sole purpose of attending school.

As an additional Finding of Fact, the Indiana State Board of Education has jurisdiction to determine whether Petitioners established legal settlement within the boundaries of the respondent school corporation in order to attend school tuition-free during the 1994-1995 school year. Any Findings of Fact which may be considered a Conclusion of Law shall be so considered.

Discussion

The separate orders from the Tippecanoe Circuit Court granting guardianship are appended to this opinion and marked as Attachments A and B. These orders are certified, and the contents therein are not disputed by either party hereto.

The parties have focused their arguments on two sections of I.C. 20-8.1-6.1-1, specifically (a)(1) and (a)(3), which state as follows:

> 20-8.1-6.1-1 **legal settlement**
>
> Sec. 1. (a) The legal settlement of a student shall be governed by the following provisions:
>
> (1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.
>
> . . .
>
> (3) Where the legal settlement of a student, in a situation to which subdivision (1) otherwise applies, cannot reasonably be determined, and the student is being supported by, cared for by, and living with some other person, the legal settlement of the student shall be in the attendance area of that person's residence, except where the parents of the student are able to support the student but have placed him in the home of another person, or permitted the student to live with another person, primarily for the purpose of attending school in the attendance area where the other person resides. The school may, if the facts are in dispute, condition acceptance of the student's legal settlement on the appointment of that person as legal guardian or custodian of the student, and the date of legal settlement will be fixed to coincide with the commencement of the proceedings for the appointment of a guardian or custodian. However, if a student does not reside with the student's parents because the student's parents are unable to support the child (and the child is not residing with a person other than a parent primarily for the purpose of attending a particular school), the student's legal settlement is where the student resides, and the establishment of a legal guardianship may not be required by the school. In addition, a legal guardianship or custodianship established solely for the purpose of attending school in a particular school corporation does not affect the determination of the legal settlement of the student under this chapter.

It should be noted that the definition for "parent" as applied to this article "means the natural, or in the case of adoption, the adopting father or mother of a child; or where custody of the child has been awarded in a court proceeding to someone other than the mother or father, the court-appointed guardian or custodian of the child;..."(Emphasis added). I.C. 20-8.1-1-3. The respondent argues that the definition of "parent" would not apply to I.C. 20-8.1-6.1-1, because the statutory provisions at issue are the more recent expressions of legislative intent. This misstates the law and the doctrine. The doctrine of most recent legislative intent is invoked where two statutory provisions are in conflict. State ex rel. Sendak v. Marion Co. Sup. Ct., 373 N.E.2d 145 (Ind. 1978); Matter of P.J., 575 N.E.2d 22, 25 (Ind. App. 1991). Merely because the legislature amended provisions or added additional provisions to an article does not raise a conflict. There is no conflict between this definition of "parent" as applied to the legal settlement provisions, for which it is intended. Respondent acknowledges that even where a conflict exists, the conflicting provisions are to be reconciled in order to give effect to legislative intent. See Wright v. Gettinger, 428 N.E.2d 1212, 1219 (Ind. 1981).

Admittedly I.C. 20-8.1-6.1-1(a)(3) is not a model of clarity by stating that guardianships cannot be established "primarily for the purpose of attending school," "primarily for the purpose of attending a particular school," and "solely for the purpose of attending school in a particular school corporation." However, there is no credible evidence that the guardianship was established "primarily" or "solely" for attending respondent's high school. Attachments A and B do not contain any such language, but indicate that the reasons for such guardianships were for the health and welfare of the Petitioners.

Attachments A and B are lawfully issued judicial decrees. Administrative agencies may not, by reason of their administrative powers, exercise judicial powers or control or interfere with the courts in the exercise by the courts of their judicial functions. 73 C.J.S. "Public Administrative Law and Procedure," §48. Respondent is asking the Indiana State Board of Education to interfere with a court's determination by construing something which isn't there. Such questions of law as presented by the Respondent are not with the State Board of Education but with the Tippecanoe Circuit Court. Citizens Gas & Coke Utility v. Sloan, 196 N.E.2d 290, 296, reh. den. 197 N.E.2d 312 (Ind. App. 1964).

Conclusion of Law

In this situation, the guardianships were issued by the Tippecanoe Circuit Court, and were in effect throughout the school-based proceedings for the 1994-1995 school year. The guardianship papers do not indicate that the guardianships were established primarily or solely for educational purposes. Without such a determination by the Tippecanoe Circuit Court, the Indiana State Board of Education is without authority to make such a determination. Respondent should have petitioned the court as to its order and not an administrative agency.

Order

Based on the foregoing, Petitioners had legal settlement in the boundaries of the Respondent, and were entitled to attend school there tuition free during the 1994-1995 school year.

Date: September27, 1995

/s/ Kevin C. McDowell
Kevin C. McDowell, Hearing Examiner
Indiana Department of Education
Room 229, State House
Indianapolis, IN 46204-2798

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its November 2, 1995, meeting, adopted the recommended order of the Administrative Law Judge.

Appeal Procedure

Any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from the receipt of this decision to seek judicial review from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.

Distribution by Certified Mail:

James V. McGlone
STUART & BRANIGIN
The Life Building
300 Main Street, Suite 800
P.O. Box 1010
Lafayette, IN 47902-1010

Richard O. Bovey
P.O. Box 6264
Lafayette, IN 47903

Jeffery P. Zaring
State Board Administrator

File

Hearing Decision File

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA STATE BOARD OF EDUCATION

In Re the Legal Settlement of:	)	
	)	
H. W.	)	**Cause No.: 9601001**
H. H.	)	
J. H.	)	
Z. H.	)	
	)	
Legal Settlement Dispute:	)	
Expulsion Under I.C. 20-8.1-5.1-11	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Procedural History

Petitioners first attended school in the New Prairie United School Corporation (NPUSC) District during the 1993-1994 school year. At that time, the children's parents had planned on moving into the school district and were allowed to enroll the children in the NPUSC District in anticipation of the move. Subsequent to the enrollment, the Warners abandoned their plans to move into the district. After learning that the Warners would not be able to move into the district, the acting superintendent of NPUSC informed the Warners that they would need to either transfer the children from the school district or pay transfer tuition. The acting superintendent agreed to waive the transfer tuition for the first semester of the 1993-1994 school year and the Warners agreed to pay the transfer tuition for the second semester.

During the spring and summer of 1994 the Warners established guardianships for their children and in August, 1994 presented documentation to NPUSC which reflected that Mr. and Mrs. Edward Lang had been appointed as legal guardians for Holly, Joslyn and Zachary Hixenbaugh and that Ms. Terry Kane was appointed guardian for Heather and Crill Warner. (Crill Warner's legal settlement status is not at issue in this appeal as the local Hearing Examiner determined that he is residing with his natural mother who lives within the NPUSC District boundaries.) By letter dated August 25, 1994, the superintendent, advised the guardians of the legal requirements establishing them as the primary provider and only contact persons with the school system.

Attachment
B

5 pp.

The children continued to attend school in the NPUSC District. Shortly after the start of the 1995-1996 school year, the attendance officer for NPUSC was asked to verify residence of the children. His report indicated that all of the children were residing with Mr. and Mrs. Warner, outside the boundaries of the NPUSC District, and not with their legal guardians. By letter dated September 18, 1995, the superintendent advised the Warners of the attendance officer's report, that this was a violation of I.C. 20-8.1-6.1-1, and of the amount of the transfer tuition owed through the first semester of the 1995-1996 school year. The Warners were advised the financial obligations had to be met in order for the children to continue school within the NPUSC and that failure to do so would result in the withdrawal of the children pursuant to the due process procedures under state statute.

An expulsion hearing was held on December 15, 1995, before Robert M. Orlowski, Hearing Examiner for NPUSC. The Hearing Examiner's Findings of Fact and Order was rendered on December 27, 1995, finding that the children (with the exception of Crill Warner, who is not a petitioner on appeal) do not have legal settlement within the NPUSC District and ordering that they be expelled at the end of the first semester of the 1995-1996 school year. By letter dated January 8, 1996 and received January 11, 1996, Petitioners, by their attorney Gregory K. Blanford, appealed the Hearing Examiner's decision to the Indiana State Board of Education.

On January 11, 1996, the hearing officer for the Indiana State Board of Education notified the parties of her appointment and requested the record of the hearing. Oral arguments were subsequently scheduled for February 16, 1996. By telephone conversation on February 14, 1996, Gregory Blanford advised the hearing officer that Mrs. Warner wished to present the oral argument for Petitioners and that he would withdraw his appearance. The written Motion to Withdraw was received by facsimile transmission on February 14, 1996.

Petitioners appeared by their mother, Mrs. Warner. NPUSC was represented by D. Michael Wallman. Prior to oral argument the hearing officer advised both parties that upon review of the evidence and testimony in this matter she believed that sometime in the past six months she had a telephone conversation with Mrs. Warner concerning the facts of this case. The parties were advised that if either party objected to the hearing officer conducting oral arguments and rendering a decision in this matter that another hearing officer would be appointed to hear oral arguments at the scheduled time on February 16, 1996. Neither party offered any objections, and with the consent of both parties the undersigned hearing officer proceeded with oral argument. The hearing officer also acknowledged receipt of Mr. Blanford's Motion to Withdraw. Mrs. Warner indicated that Mr. Blanford's withdrawal was at her request. The Motion to Withdraw is granted.

It should be noted that the underlying hearing, and therefore this appeal, addressed only the legal settlement issue and not the amount of tuition determined by NPUSC. The responsibility to pay tuition and the amount of tuition due are not issues before the Indiana State Board of Education.

After review of the testimony and evidence and after hearing oral argument, the hearing officer makes the following findings of fact, conclusions of law and order:

Findings of Fact

1. The Indiana State Board of Education has jurisdiction under I.C. 20-8.1-6.1-10(a)(1) to review decisions to expel students from school corporations for lack of legal settlement.

2. Petitioners (the children) are Heather Warner, daughter of Mr. Crill Warner, Sr. from a previous marriage and Holly, Joslyn and Zachary Hixenbaugh, children of Mrs. Crill Warner from a previous marriage.

3. The children were initially enrolled in NPUSC for the fall semester of the 1993-1994 school at a time when Mr. and Mrs. Warner were planning to move into the NPUSC District. These plans were subsequently changed, and the Warners and their children abandoned plans to move into the NPUSC District.

4. In an effort to allow their children to continue to attend NPUSC District schools, Mr. and Mrs. Warner established guardianships for the children with individuals residing within the NPUSC boundaries.

5. At no time did any of the children reside with the guardians.

3. At all times since the children initially enrolled in the NPUSC District schools in 1993 they have resided with Mr. and Mrs. Warner at 28051 U.S. 20, New Carlisle, Indiana, an address outside the NPUSC District and within the attendance area of the South Bend Community School Corporation.

Conclusions of Law

1. Petitioners reside with and are supported and cared for by Mr. and Mrs. Warner. I.C. 20-8.1-6.1-1(a).

2. Petitioners' legal settlement has at all time relevant been within the attendance area of the South Bend Community School Corporation.

3. Petitioners have not objected to any of the findings of the Hearing Examiner. The evidence and testimony clearly support the findings of the Hearing Examiner. The Hearing Examiner's findings of fact and order are consistent with law.

4. A legal guardianship or custodianship established solely for the purpose of attending school in a particular school corporation does not affect the determination of the legal settlement of the student. I.C. 20-8.1-6.1-1(3).

Discussion

Petitioners have not raised any specific objections to any part of the Hearing Examiner's Findings of Fact and Order. In fact, they readily admit that the guardianship was established to allow the children to attend NPUSC District schools. They further acknowledge that they are aware of the language of I.C. 20-8.1-6.1-1(3) which provides that the establishment of legal guardianship solely for the purpose of attending school in a particular school corporation does not affect the determination of legal settlement. Although Petitioners claim that they have never misrepresented where the children live to NPUSC, the record is absent of any testimony or evidence that NPUSC was notified directly, prior to its investigation, that the children did not live with the guardians. It is clear that NPUSC took the guardianship papers at face value. When NPUSC began to suspect that the children were not living with the guardians, they investigated. The results of the investigation led to this hearing and appeal.

There is no claim made on appeal that the findings of fact are erroneous, or that the findings of fact or order are contrary to law. Petitioners state that they are looking for a sympathetic ear. Since the findings of fact are supported by the evidence and the Hearing Examiner's Order is consistent with law, the Indiana State Board of Education must affirm the Findings of Fact and Order as they pertain to the Petitioners.

Order

Petitioners did not establish legal settlement within NPUSC during the period commencing with the beginning of school in August, 1993 through the first semester of the 1995-1996 school year. The Hearing Examiner's Findings of Fact and Order, attached hereto and incorporated by reference as Exhibit A, are affirmed as to Petitioners[1].

Dated: February 20, 1996

/s/ Dana L. Long
Dana L. Long, Hearing Officer for the
State Board of Education

[1]Crill Warner is not a Petitioner herein, therefore the Hearing Examiner's Findings of Fact and Orders, as they may pertain to Crill Warner, and specifically Findings of Fact 10 through 12 and Order number 2, are not subject to this appeal.

INDIANA STATE BOARD OF EDUCATION ACTION

On April 11, 1996, the Indiana State Board of Education heard oral argument. The Board then tabled its determination in this matter until its June, 1996, meeting. The Indiana State Board of Education, at its June 6, 1996, meeting, adopted the decision of the Administrative Law Judge by unanimous vote.

APPEAL PROCEDURE

Any party aggrieved by the decision of the Indiana State Board of Education can seek judicial review from a civil court with jurisdiction within thirty (30) calendar days from receipt of this decision.

TITLE 511 INDIANA STATE BOARD OF EDUCATION

Proposed Rule
LSA Document #95-230

DIGEST

Amends 511 IAC 1-6-2 to change the date by which a student must submit a request for a student transfer under the better accommodation provisions of IC 20-8.1-6.1-2. Amends 511 IAC 1-6-3 to clarify requirements for establishing better accommodation. Amends 511 IAC 1-6-4 to correct a reference to another rule. Effective 30 days after filing with the secretary of state.

511 IAC 1-6-2
511 IAC 1-6-3
511 IAC 1-6-4

SECTION 1. 511 IAC 1-6-2 IS AMENDED TO READ AS FOLLOWS:

511 IAC 1-6-2 Transfer at request of parents or student
Authority: IC 20-8.1-6.1-11
Affected: IC 20-8.1-6.1-2

Sec. 2. Requests for transfers under IC 20-8.1-6.1-2 shall be made, in writing, to the transferor by **April 1 preceding** the first day of school at the transferor in the school year for which transfer is requested. All requests shall be for only one (1) school year. The requests shall be made on the form prescribed by the superintendent of public instruction and shall set forth specifically the reason(s) for the request. *(Indiana State Board of Education; Rule A-4, Sec 3; filed Aug 31, 1981, 10:00 a.m.:*

Attachment
C

2 pp.

4 IR 1974; filed Oct 13, 1987, 2:38 p.m.: 11 IR 935) NOTE: Transferred from the commission on general education (510 IAC 2-4-3) to the Indiana state board of education (511 IAC 1-6-2) by P.L.20-1984, SECTION 206. Effective July 1, 1984.

SECTION 2. 511 IAC 1-6-3 IS AMENDED TO READ AS FOLLOWS:

511 IAC 1-6-3 Determination of better accommodation

Authority: IC 20-8.1-6.1-11
Affected: IC 20-8.1-6.1-2

Sec. 3. Except where ~~511 IAC 1-6-4~~ section 4 of this rule applies, a student will be determined to be better accommodated in the transferee than in the transferor, as provided in IC 20-8.1-6.1-2, on a showing of one (1) or more of the following:

(1) Curriculum:

(A) the student has established an academic or vocational aspiration, a curriculum offering at the high school level that is important and necessary to that aspiration is available to the student at the transferee, and that curriculum offering at the high school level or a substantially similar curriculum offering at the high school level is unavailable to the student at the transferor; or

(B) ~~after August 1, 1989~~ the student is capable of earning an academic honors diploma, the school corporation does not offer the required academic honors diploma courses, and the student has completed ~~all~~ academic honors diploma courses offered by the transferor **and available to the student**.

(2) Crowded conditions:

(A) overcrowding at the transferor materially affects the student's opportunity to learn; and

(B) conditions at the transferee would be significantly less crowded.

(3) Medical:

(A) attendance by the student at the transferor entails the risk of physical illness; and

(B) in the opinion, **as supported by written documentation,** of two (2) persons holding unlimited licenses to practice medicine in Indiana who have examined the student, attendance at the transferee would substantially reduce this risk.

(4) Accreditation:

(A) the school to which the student is assigned in the transferor is not **fully** accredited by the board; **and**

(B) ~~there is no other school offering the student's grade level in the transferor that is accredited by the board. and~~ **the student's request is related to the reason that the school has been accorded probationary accreditation status.**

~~(C) the school the student would attend in the transferee is accredited by the board.~~

(Indiana State Board of Education; Rule A-4, Sec 4; filed Aug 31, 1981, 10:00 a.m.: 4 IR 1974; filed Mar 24, 1987, 3:00 p.m.: 10 IR 1694; filed Oct 13, 1987, 2:38 p.m.: 11 IR 935) NOTE: Transferred from the commission on general education (510 IAC 2-4-4) to the Indiana state board of education (511 IAC 1-6-3) by P.L.20-1984, SECTION 206. Effective July 1, 1984.

SECTION 3. 511 IAC 1-6-4 IS AMENDED TO READ AS FOLLOWS:

511 IAC 1-6-4 Relation to state board rule on special education

Authority: IC 20-8.1-6.1-11
Affected: IC 20-1-6-1; IC 20-8.1-6.1

Sec. 4. No student who is a handicapped child as defined in IC 20-1-6-1(a) will be determined to be better accommodated in the transferee than in the transferor where the hearing procedures provided by the state board's rules on special education, ~~511 IAC 7-1-3(g)~~ 511 IAC 7-15-5, are available or have been utilized by the student, parent, or guardian. *(Indiana State Board of Education; Rule A-4, Sec 5; filed Aug 31, 1981, 10:00 a.m.: 4 IR 1975; filed Oct 13, 1987, 2:38 p.m.: 11 IR 936) NOTE: Transferred from the commission on general education (510 IAC 2-4-5) to the Indiana state board of education (511 IAC 1-6-4) by P.L.20-1984, SECTION 206. Effective July 1, 1984.*

Notice of Public Hearing

Under IC 4-22-2-24, notice is hereby given that on April 11, 1996 at 9:00 a.m., at the Department of Education, Two Market Square Center, 251 East Ohio Street, Conference Room 4 CD, Indianapolis, Indiana the Indiana State Board of Education will hold a public hearing on proposed amendments to rules concerning transfers. Copies of these rules are now on file at the 229 State House and Legislative Services Agency, Indiana Government Center-South, 302 West Washington Street, Room E011, Indianapolis, Indiana and are open for public inspection.

Suellen Reed
Superintendent of Public Instruction
Indiana State Board of Education

Indiana
State Board of Education

Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA
STATE BOARD OF EDUCATION
Cause No. 9511024

In the Matter of K.M.W.	)	
	)	**Findings of Fact,**
Transfer Tuition Dispute Under	)	**Conclusions of Law,**
511 IAC 1-6-3(1) re: Curriculum	)	**and Orders**
East Porter County School Corporation	)	

Procedural History

The parents of K. M. W. filed a Transfer Request Application with the East Porter County School Corporation (EPCSC) on October 10, 1995, requesting tuition reimbursement for four courses at Valparaiso Community Schools. K. M. W. is a freshman in high school. He intends to pursue the International Baccalaureate diploma or the Academic Honors diploma. The EPCSC rejected the request on November 6, 1995, because the request was not made by the first day of school. 511 IAC 1-6-2. The parents indicated their intent to appeal the denial to the State Board of Education on November 13, 1995, although the appeal was not received until November 21,1995. The parents acknowledged receipt of the EPCSC's denial through a telephone conversation on November 8, 1995.

In the appeal letter, the parents asserted the EPCSC does not offer either the International Baccalaureate (IB) diploma or the Academic Honors diploma. The parents are seeking transfer under 511 IAC 1-6-3(1), which reads as follows:

Sec. 3. Except where 511 IAC 1-6-4 applies, a student will be determined to be better accommodated in the transferee than in the transferor, as provided in IC 20-8.1-6.1-2, on a showing of one or more of the following:

(l) Curriculum:

(A) the student has established an academic or vocational aspiration, a curriculum offering at the high school level that is important and necessary to that aspiration is available to the student at the transferee, and that curriculum offering at the high school level or a substantially similar curriculum offering at the high school level is unavailable to the student at the transferor; or

Attachment
D
5 pp.

(B) after August 1, 1 989, the student is capable of earning an Academic Honors diploma, the school corporation does not offer the required Academic Honors diploma courses, and the student has completed all Academic Honors diploma courses offered by the transferor.

By "Notice of Appointment and Preliminary Order" dated November 29, 1995, the undersigned informed the parties of his appointment and informed the parents he was treating the school's response as a "Motion to Dismiss" and requested a response from the parents regarding the apparent lack of timeliness. The parents responded on December 4, 1995, and indicated they contacted the school in early August regarding a transfer request. The parents did not obtain a form from the school until September, and then delayed submission until October in order to provide course number information. The parents allege they were never informed of the deadline for filing a transfer tuition request. There is disagreement as to the content of conservations between the parents and school officials. The school responded on December 18, 1995, to the parents' response.

The hearing examiner took under advisement the EPCSC's Motion to Dismiss by entry dated December 11, 1995. A hearing was set for January 4, 1996, but this date was continued due to inclement weather. The hearing was conducted on February 8, 1996. Both parties were advised of their hearing rights. Both parties appeared and presented their cases.

Findings of Fact

Based upon documents received into evidence and testimony provided at the hearing, the following Findings of Fact are determined.

1. K. M. W. is a ninth grade student (date of birth 7-11-80) with legal settlement in EPCSC. He attends Valparaiso High School in the Valparaiso Community Schools.

The parent contacted the superintendent by telephone on August 7, 1995; however, the superintendent was not in but returned the call on August 9, 1995, during which transfer tuition was discussed, including the necessary form. Although there is disagreement regarding whether the form would be mailed or picked up, there is apparently no disagreement that a timeline for filing was not discussed. The transfer request application form does contain the timeline for filing. The parent did not obtain the form until late September or early October, and did not file the form until October 10, 1995.

The EPCSC denied the request on November 6, 1995. On November 8, 1995, the parents contacted EPCSC by telephone and acknowledged receipt of the denial. However, the State Board of Education did not receive the appeal from the parents until November 2 1, 1995. The transfer request application requires appeals to be sent to the Indiana State Board of Education by certified mail "within ten days after the receipt of the local school corporation's denial."

K. M. W. ("petitioner") attended elementary school in EPCSC, but experienced difficulties. He transferred to Thomas Jefferson Middle School in the Valparaiso Community Schools for grades 6-8. The parents did not seek transfer tuition for these three years. The student progressed academically. He has been on the honor roll and involved in school activities.

5. Parents assert the EPCSC does not have the International Baccalaureate diploma or Academic Honors diploma, and this was the basis for the transfer request. At the hearing, the parents raised for the first time an alleged vocational aspiration in veterinarian medicine. This did not appear in the transfer request application.

6. The four courses for which the parents request transfer tuition are world history, biology, German, and Honors English 9. The first three courses are alleged to be "pre-International Baccalaureate."

7. Although the parents believed EPCSC did not offer the Academic Honors diploma, EPCSC does offer such a diploma.

8. EPCSC offers Advanced Placement courses.

9. EPCSC offers courses similar to those petitioner is enrolled in at Valparaiso High School.

10. Freshmen and sophomores are not eligible for the International Baccalaureate diploma. Petitioner is not denied admittance to the International Baccalaureate program, which is for juniors and seniors, because he received his core instruction at another school.

Conclusions of Law

1. Although the parents did not timely file the transfer request application, they did notify the school of their intentions in a timely fashion. Through a series of understandable misunderstandings and miscommunications, the parents were unaware of the deadline for filing the application.

2. The parents did not timely file their appeal with the State Board of Education.

3. The parents did not inform the school corporation of the petitioner's alleged vocational aspiration in veterinarian medicine. This failure to notify the school corporation precludes the State Board from considering a vocational aspiration of the petitioner.

4. The course offerings for EPCSC and Valparaiso High School are similar with respect to petitioner.

5. EPCSC offers the Academic Honors diploma.

6. The petitioner is not yet eligible for the International Baccalaureate diploma.

7. The International Baccalaureate diploma is not justification, in and of itself, for granting a transfer of tuition.

8. The Indiana State Board of Education has jurisdiction in this matter.

Discussion

The Indiana State Board of Education has considered and denied two other transfer request applications based upon an academic pursuit of the International Baccalaureate diploma. In the matter of T.M., Cause No. 9408013 (SBOE 1995), the State Board denied a transfer request to the International Baccalaureate program at the Fort Wayne Community Schools for a ninth grade student. The State Board noted that the International Baccalaureate diploma program involves a student only in the student's 11th and 12th grades. The State Board also noted that the International Baccalaureate diploma is related to one's attendance in college and is not considered a vocational or academic aspiration under 511 IAC 1-6-3(1). "While attending a postsecondary institution is a worthy goal, it is not the type of specific aspiration contemplated by the Rule." (At p.3.) The State Board reiterated in In the Matter of K.L.W., Cause No. 9409022 (SBOE 1995) that the International Baccalaureate program "is not related to any vocational or academic aspiration, other than to provide specific challenges to college-bound students. Successful completion of the International Baccalaureate program does not ensure acceptance to any college or university." (At p.3.)

ORDERS

The school corporation's Motion to Dismiss for lack of timely filing is denied.

The parent's appeal, although not timely, is decided on its merits because the student has not established a vocational or academic aspiration under 511 IAC 1-6-3 (1) which would justify the granting of a transfer, and the course offerings by East Porter County School Corporation and Valparaiso Community Schools, with respect to the petitioner, are similar.

Date: March 14, 1996

/s/Kevin C. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education
(317) 232-6676
FAX: (317) 232-8004

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of May 2, 1996, adopted the decision of the hearing examiner by a vote of 8-2.

Appeal Right

Any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from receipt of this decision to seek judicial review from a civil court with jurisdiction, as provided by I.C. 20-8.1-6.1-10(e).

Indiana Professional Standards Board

"Setting standards for the preparation and licensing of educators"

251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
Telephone: 317/232-9010 • FAX: 317/232-9023

IN THE MATTER OF:	)	
CAUSE NO. 950601082	)	
	)	Findings of Fact
D. L. D.,	)	Conclusions of Law
Petitioner	)	and Order
	)	
Fitness Hearing under 515 IAC 1-2-18(g)	)	

Statement of the Case

D. D. has a B.S. in math from the University of Central Arkansas. During the mid-1980's because of a neck injury and two subsequent surgeries, Mr. D. became addicted to prescription pain medication. As the result of his addiction he engaged in unlawful behavior. He was convicted twice on felony changes for forging prescriptions. Mr. D. recently applied to the Division of Teacher Licensing for a substitute teaching certificate, at which time he was advised he must participate in a fitness hearing. The hearing was conducted on July 12, 1995 at which time a panel of Administrative Law Judges heard testimony from Mr. D. and the Division of Teacher Licensing.

Findings of Fact

1. The Professional Standards has both personal and subject matter jurisdiction in this cause.
2. D. D. has a B.S. in math from University of Central Arkansas earned in 1981.
3. D. D. is a veteran of both the U.S. Army and the U.S. Air Force.
4. D. D. taught for one (1) year in a private military high school in Georgia.
5. In the mid-1980s, Mr. D. sustained a neck injury that caused him extreme pain. In 1987 and again in 1988 he underwent two neck surgeries. Due to Mr. D.'s long use of

prescription pain medication, he became addicted to Demerol.

6. To support his addiction, Mr. D. began forging prescriptions for pain medication. He was arrested and convicted twice on forgery charges on 1993. He is on probation for approximately nine more months on the first conviction. He is on Home Detention for the second conviction for another year; however, the court may agree to modify (shorten) that sentence in the near future.

7. Mr. D. completed a drug rehabilitation program through the Veterans' Administration in 1994. He has been drug free for 17 months. He attends NA meetings several times a week.

8. Mr. D. has successfully passed three drug tests since he completed his program. As a condition of his probation and home detention, he is subject to drug testing at any time.

9. Mr. D. is employed through a temporary manpower service at Cellular One. He has been there since March 1995. Mr D. is also employed on weekends at McDonalds.

10. Mr. D.'s supervisor at Cellular One and a fellow employee wrote letters on his behalf indicating he is a hard working, reliable employee.

11. Based on Mr. D.'s B.S. degree he would be eligible for a 5-year substitute certificate.

Conclusions of Law

1. Any Finding of Fact that can be considered a Conclusion of Law is deemed a Conclusion of Law. Any Conclusion of Law that can be considered a Finding of Fact is deemed a Finding of Fact.

2. The Professional Standards Board's rule concerning individuals seeking licensure who have criminal convictions is found at 515 IAC 1-2-18. The rule states, in pertinent part:

> (g) An individual who committed an offense for which a teaching license could be suspended or revoked prior to seeking an initial teaching license

> or renewal of a teaching licnese may be required to participate in a hearing to determine the individual's fitness to hold a teaching license. The professional standards board may deny or hold pending an individual's applicaiton for an initial license or a license renewal until the outcome of the fitness hearing, if a fitness hearing is required, is known.
>
> (h) ...[A]n individual required to participate in a fitness hearing under subsection (g) before receiving an initial license shall have the burden of proving fitness to hold a license. The professional standards board shall consider the following facts:
>
> > (1) The likelihood the conduct or offense adversely affected, or would affect, students or fellow teachers, and the degree of adversity anticipated.
> >
> > (2) The proximity or remoteness in time of the conduct of offense.
> >
> > (3) The type of teaching credential held or sought by the individual.
> >
> > (4) Extenuating or aggravating circumstances surrounding the conduct or offense.
> >
> > (5) The likelihood of recurrence of the conduct or offense.
> >
> > (6) The extent to which a decision not to issue the license would have a chilling effect on the individual's constitutional rights or the rights of other teachers.
> >
> > (7) Evidence of rehabilitation, such as participation in counseling, self-help support groups, community service, gainful employment subsequent to the conduct or offense, and family and community support.

In this case Mr. D. has completed a drug rehabilitation program and has successfully passed several subsequent drug tests. He is active in a self-help support group. He is employed and is considered a reliable employee, although his length of employment is still relatively short. He would like to substitute teach and perhaps return to college to complete requirements for a standard license. However, Mr. D.'s request to hold a license is premature. The major impediment to determining Mr. D.'s fitness to hold a license at this time is the fact that he has

not yet completed the sentences for either of his convictions.

The Professional Standards Board has been asked before to reinstate a revoked license prior to the petitioner's completion of probation, and declined to do so. *In re* N. Berbeco , Cause No. R921214008, (PSB July 1993). The strides Mr. D. has made in getting his life together are commendable, but this board will not consider Mr. D.'s request to hold a license until he can present evidence that he has served both of his sentences. By that time Mr. D. will also have had a longer period of employment and more time drug-free, both of which will be to his advantage. The Professional Standards Board hopes it will have the opportunity to again review Mr. D.'s fitness to hold a license when his sentences are completed..

Order

The Professional Standards Board will not determine Petitioner's fitness to hold a license at this time since he has not yet completed his sentences.

So ordered this 27th day of July, 1995.

Philip L. Metcalf, ALJ

Risa A. Regnier, ALJ

Decision of the Indiana Professional Standards Board

The Indiana Professional Standards Board, at its meeting of September 21, 1995, considered the above recommended decision and approved it by unanimous voice vote.

Indiana Professional Standards Board
"Setting standards for the preparation and licensing of educators"
251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
Telephone: 317/232-9010 • FAX: 317/232-9023

Cause No. 940826074

In the Matter of	)	
L.A.N.	)	Before Susan K. Straw
Teaching License No. 459784	)	and Kevin C. McDowell,
	)	Administrative Law Judges
Revocation Action Pursuant to	)	
515 IAC 1-2-18	)	

Findings of Fact, Conclusions of Law, and Order

Procedural History

The State Superintendent of Public Instruction, by her counsel John T. Roy and pursuant to I.C. 20-6.1-3-7, initiated this revocation action against the Respondent on August 26, 1994. The complaint alleged in three counts that Respondent pleaded guilty to attempted possession of cocaine, a Class D felony. Respondent was sentenced, however, as a Class A misdemeanant. Respondent held during this time a valid Indiana Teaching License, number 459784.

Administrative Law Judges were appointed. The parties were notified of the appointments on October 14, 1994. A hearing was set for November 17, 1994.

Robert W. Hammerle entered his appearance on October 25, 1994, on behalf of Respondent. Respondent moved for a continuance of the hearing, asking instead that the hearing date be reserved for a prehearing conference. The Administrative Law Judges granted the continuance on October 25, 1994, and set the matter for a prehearing conference on November 17, 1994.

A prehearing conference was conducted on November 17, 1994. A prehearing order was issued that date. Respondent, by his counsel, acknowledged the plea agreement and conviction, but asked that mitigating circumstances be considered and that revocation not occur. The parties were advised that the pleadings alone would not constitute sufficient reason for revocation where the Respondent has exercised his right to respond. A hearing would be necessary to receive additional testimony, observe Respondent's demeanor, and judge his credibility. Hearing was reset for January 19, 1995.

Both parties moved on January 4, 1995, for a continuance of the January 19, 1995, hearing date. Both motions were granted. The hearing was reset for February 16, 1995.

Attachment
F

5 pp.

Respondent moved on January 30, 1995, for a continuance of the February 16, 1995, hearing date. This was granted the same date.

On February 6, 1995, Dana L. Long, Esq., entered her appearance on behalf of the State Superintendent. By agreement between the parties, the hearing was reset for April 20, 1995.

The hearing was conducted on April 20, 1995, in the offices of the Indiana Department of Education. Both parties were represented by counsel. Respondent appeared in person. The parties stipulated to the authenticity of the documents (Exhibits A-F) attached to the State Superintendent's complaint. The State Superintendent also introduced three more exhibits (Exhibits G-I). Respondent introduced one exhibit (R-1). These exhibits are more particularly described as follows:

Exhibit

A. Information charging Respondent with conspiracy to commit dealing in cocaine and attempted possession of cocaine.

B. Probable Cause Affidavit charging Respondent with dealing and conspiracy to deal cocaine in an amount greater than three grams.

C. Plea agreement between Respondent and the State of Indiana, wherein Respondent pleaded guilty to attempted possession of cocaine, a Class D felony.[1]

D. Amended count, charging Respondent with attempted possession of cocaine, a Class D felony.

E. Court minutes of Respondent's guilty plea hearing (6/9/94). The minutes indicate Respondent has no criminal history and he "is forbidden to teach in a school."

F. Abstract of the court's judgment.

G. I.C. 20-6.1-3-7 (License Revocation and Suspension)

H. 515 IAC 1-2-18 (License Revocation, Suspension, Surrender).

I. Copy of Respondent's Teacher's License.

R-1 Respondent's Pre-Sentencing Memorandum.

---

[1]The plea agreement also permits the Respondent to keep his teacher's license so long as he does not teach in a public school for the next ten years.

Following review of the documents and the testimony provided at the hearing, the following Findings of Fact are made:

1. Respondent possesses a valid Indiana Teacher's license (#459784).

2. The Indiana Professional Standards Board has jurisdiction in this matter.

3. Respondent pleaded guilty to attempted possession of cocaine, a Class D felony. As a part of the plea agreement with the State of Indiana, Respondent was permitted to keep and maintain his Indiana teacher's license, with the condition that for the next ten years "he shall not personally teach inside any public school facility." In addition, Respondent was permitted to continue his driving instructor business so long as "those duties do not involve his instructing or teaching inside a public school facility." (Exhibit C).

4. The court accepted the plea agreement on June 9, 1994, except that the Respondent is "forbidden to teach in a school" (Exhibit E). The court sentenced Respondent as a Class A misdemeanant. He was sentenced to one year in jail, which was suspended. He was placed on probation for one year and ordered to pay court costs of $113.00 and a fine of $137.00.

5. By all accounts, Respondent was well respected by his colleagues and peers as a teacher in the public schools, where he taught for over twenty years.

6. Respondent's personal life became strained in 1990 when his wife of twenty years died, leaving him with three daughters. Approximately eight months later he became involved with a woman who was separated from her husband and was seeking a divorce. Her frustration with divorce and custody proceedings began to involve Respondent emotionally. Respondent described himself and his family as depressed following his wife's death. The family sought counseling. Respondent also described himself as depressed and angry over the personal battles of his friend.

7. A series of conversations ensued with a high school student known to Respondent to be of questionable character. The student proposed purchasing some drugs and placing it in the car of his friend's seemingly recalcitrant husband. Although Respondent initially rebuffed the suggestion, he eventually acceded. The student, however, was a confidential informant, and Respondent was arrested when he attempted to complete the purchase of the cocaine. Although the time frame is not exact, it appears these discussions took place over a period of four to five weeks. Respondent was arrested on July 4, 1991.

8. Respondent has no prior record of arrests or convictions either as an adult or a juvenile.

9. Respondent remarried on July 10, 1993, but not to the woman whose marriage problems he had become immersed. Respondent and his wife, who also attended the hearing, are employed at AA driving school, which Respondent owns.

10. The Indiana Professional Standards Board (IPSB) has no mechanism to enforce the plea agreement with its ten-year agreement not to teach except through suspension/revocation proceedings under I.C. 20-6.1-3-7 and 515 IAC 1-2-18.

11. Although Sara Trusty, Donald E. Gross and Respondent's wife addressed Respondent's personal character and professional ability, others were present and offered testimony as well, although they acknowledged their remarks would be cumulative. The additional declarants, in person or in writing, were David A. Garrett, Sandra Reiberg, Edward Dwer, William and Carol Alsman, Rhonda and James Rogers, Paula Fetter, and Aurelia Moses. All declarants on Respondent's behalf were aware of the circumstances underlying this revocation action, but testified as to Respondent's character and reputation, and that the actions are not likely to recur.

Discussion

This situation illustrates unresolved areas within the suspension, revocation and reinstatement of teacher's licenses in Indiana. While I.C. 20-6.1-3-7 requires the State Superintendent of Public Instruction to initiate revocation proceedings and reserves to the State Superintendent suspension power (one-year suspension for unprofessional conduct due to inappropriate cancellation of an indefinite contract by a teacher), this statute does not address the type of suspension contemplated by 515 IAC 1-2-18(c). Nonetheless, I.C. 20-1-1.4-7(4) does grant to the IPSB the authority to adopt rules to "Suspend, revoke, or reinstate teacher licenses." This latter statute is read as conferring upon the IPSB the authority to suspend a teacher's license, with or without the recommendation of the State Superintendent. The IPSB would have to have the State Superintendent's recommendation prior to revocation, but the IPSB is not bound to follow the recommendation but may fashion a remedy of its own, consistent with its statutory authority and its rules. Suspension under 515 IAC 1-2-18 is an available remedy, and could have been initiated by the IPSB on its own complaint. The State Superintendent's recommendation is a condition precedent only to revocation by the IPSB and does not restrict the IPSB to revocation consideration only.

Conclusions of Law

1. The IPSB has jurisdiction in this matter. The IPSB is not bound by the agreement reached between Respondent and the State of Indiana in the criminal proceedings. The IPSB is entitled to conduct its own inquiry consistent with its statutory authority and resulting regulations, and fashion appropriate orders and remedies accordingly.

2. Respondent is acknowledged by colleagues and peers as an exemplary teacher with over twenty years service to the public schools of Indiana. All declarants on behalf of Respondent were aware of the underlying criminal activity which served as the basis of this proceeding. As the declarants were aware of the circumstances, their testimony as to his character and reputation are accorded greater weight as to Respondent's fitness to teach and the remoteness that such criminal activity will recur. See In the Matter of

C.R.C., Cause No. 940419067 (IPSB 1994) for related treatment of credible testimony involving academic qualifications, character and reputation such that one should be permitted to teach in Indiana's schools.

3. Respondent's activity is contrary to the provisions of 515 IAC 1-2-18(b)(3) in that he has been convicted of a misdemeanor or felony involving "drug related offenses." Although the declarations of peers and colleagues as well as his own record speak well of Respondent, the excessive period of time during which the criminal enterprise was developed is an aggravating circumstance.

4. All mitigating and aggravating circumstances considered, Respondent's activity warrants a suspension of his license and not a revocation.

Order

Respondent's Indiana Teacher's License (#459784) is suspended for two (2) years from the date of final action by the Indiana Professional Standards Board. As provided by 515 IAC 1-2-18 (c), at the end of said suspension, Respondent's license shall be reinstated upon the written request of the license holder.

August 15, 1995
Date

/s/ Susan K. Straw
Susan K. Straw,
Administrative Law Judge

August 15, 1995
Date

/s/Kevin C. McDowell
Kevin C. McDowell,
Administrative Law Judge

Decision of The Indiana Professional Standards Board

The Indiana Professional Standards Board, at its meeting of September 21, 1995, and following oral argument by the parties, upheld the decision of the Administrative Law Judges, suspending the license of Respondent for two years from September 21, 1995. The vote was 11-1 with two abstentions.

Appeal Procedure

Any party aggrieved by the decision of the Indiana Professional Standards Board may, within thirty (30) calendar days from receipt of this written decision, seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.

COMPLAINT INVESTIGATION REPORT

Complaint filed by:
Complaint investigator: Dana L. Long, Esq.

Complaint issue:

Whether the Indiana Department of Education (IDOE) discriminated against the Complainant, in violation of the Americans with Disabilities Act (ADA), because of the requirements of I.C. 20-9.1-3-1(g)(2). In the course of the investigation, the Complainant indicated the IDOE was in violation of the ADA because of its policies and practices and the failure of the IDOE to provide a waiver of the requirements of I.C. 20-9.1-3-1(g)(2).

Telephone interviews:

Name	Position	Dates
Pete Baxter	Director, School Traffic Safety	May 18 & 31, 1995
John Steinbacher	Director, Human Resources	May 19 and June 14, 1995
John-Jay Steinhardt	Casemanager, Ind. P & A	June 14 & 15, 1995

(Several attempts were made to contact the Complainant by telephone between May 18 and May 26, 1995. No answer was received. On May 26, 1995 a message was left on the answering machine for Complainant to call the investigator. On June 2, 1995, the investigator called again and left a message with a woman to have the Complainant call the investigator, either at work or at home. The investigator then wrote to the Complainant requesting a response to certain questions. The written response to these questions was received on June 19, 1995.)

Personal interviews:

Name	Position	Dates
John-Jay Steinhardt	Casemanager, Ind. P & A	June 14, 1995

Documents received by the investigator from:

The Complainant

Letter of complaint dated May 11, 1995 and received by the Indiana Department of Education on May 15, 1995.
Letter from David Arrensen, Bureau of Motor Vehicles, to the Complainant, dated May 1, 1995.
DOT/CDL Physical Examination Form (blank).
Letter from The Martin Luther King Montessori School, signed by Paul Hirshmann, Board President, and Gloria Jones, Executive Director, to Complainant dated March 1, 1995.
Job description for bus driver, Martin Luther King Montessori School.

Letter from The Martin Luther King Montessori School, signed by Paul Hirshmann, Board President, and Gloria Jones, Executive Director, to Complainant dated January 23, 1995.

Findings of Fact

1. The Complainant was employed as a school bus driver by the Martin Luther King Montessori School in Fort Wayne, Indiana, from November 17, 1988 until January 23, 1995.

2. The Complainant holds a commercial driver's license (CDL) with an intrastate restriction due to her diabetes mellitus, which is controlled by insulin.

3. On December 29, 1994, the Complainant's left leg was amputated below the knee.

4. On January 23, 1995, the Complainant was notified she could no longer hold her position as a school bus driver. The reason given for this determination was that she did not qualify as a school bus driver because of her condition. She was further advised that this was a "state regulation."

5. The Complainant was fitted with a temporary prothesis in January, 1995 and plans to receive a permanent prothesis in early July, 1995.

6. At no time relevant to this complaint was the Complainant employed by the Indiana Department of Education (IDOE).

Conclusions of Law

1. The IDOE has jurisdiction over alleged violations of the Americans with Disabilities Act (ADA) by the IDOE. The IDOE does not have jurisdiction over alleged violations of the ADA by public or private school corporations.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such and any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. Indiana Code 20-9.1-3-1(g)(2) does not authorize the IDOE, the Indiana State Board of Education or the State School Bus Committee to waive the requirements of the statute, nor to make regulations concerning the implementation of the statute.

4. The IDOE has no authority to make any employment decisions concerning school bus drivers in the state of Indiana. Such employment decisions are a matter of local control and authority, subject to the requirements of law.

5. The Complainant was not employed by the IDOE. The IDOE therefore had no control or authority over her employment or the termination of that employment. The IDOE has no jurisdiction over the school's employment practices.

Discussion

This complaint arose due to the application of I.C. 20-9.1-3-1(g)(2) to an individual who, during the course of her employment as a school bus driver, underwent surgery for the amputation of her left leg. Less than one month after the amputation, she lost her job due to the provisions of I.C. 20-9.1-3-1(g)(2). This statute provides:

> A person may not drive a school bus for the transportation of school children unless the person:
>
> . . .
>
> (g) possesses the following required physical characteristics:
>
> (1) sufficient physical ability to drive a school bus;
>
> (2) possession and full normal use of both hands, both arms, both feet, both legs, both eyes and both ears;
>
> (3) freedom from any communicable disease;
>
> (4) freedom from any mental, nervous, organic or functional disease which might impair the person's ability to operate a school bus; and
>
> (5) visual acuity, with or without glasses, of at least 24/40 in each eye and a field of vision with 150 degree minimum and with depth perception of at least 80%.

Indiana Code 20-9.1-3-1 was enacted by the Indiana legislature in 1973 and amended in 1982 to provide for the safe transportation of children to and from school. Unlike many other drivers on the road, the school bus driver is charged not only with safe driving but with many other responsibilities. The driver is responsible for the safety of others. This safety is provided to passengers, mostly young children, who are unable to make decisions or know what will place them in danger. The duties of a school bus driver may include assisting small children and children with disabilities on and off of the bus, assisting or transporting children from one bus onto another bus, assisting or transporting children from the bus into the school or to the classroom, maintaining discipline and assisting, evacuating and caring for children in the event of emergencies. Children often may not have the mental or physical maturation or ability to behave or react appropriately in these circumstances. The school bus driver must have both the mental and physical capabilities to assure the safety of our children.

Fitness standards which impose eligibility criteria that exclude some individuals with disabilities are not prohibited by the ADA where they have a rational relationship to an individual's ability to perform the essential functions of the job (McCarthy v. Nassau County, et al., 617 N.Y.S.2d 860, 6 NDLR ¶56 (Sup.Ct., App.Div. 1994)) or where they are necessary to prevent a significant risk to the health or safety others (Wann v. American Airlines, Inc., H-93-

2123, 6 NDLR ¶33 (S.D.Tex. 1994). An individual is not "qualified" for a driver's license unless he or she can operate a motor vehicle safely. A public entity may establish requirements, such as vision requirements, that would exclude some individuals with disabilities, if those requirements are essential for the safe operation of a motor vehicle. A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. DOJ, Technical Assistance Manual Title II-3.7200.

What the ADA and its regulations do require, however, is an individualized determination as to whether an individual is a "qualified individual with a disability"; that is, whether the individual, with or without reasonable accommodation, can perform the essential functions of the employment position. This would require an individual determination as to whether the individual could safely perform the essential functions of the position. In applying the provisions of I.C. 20-9.1-3-1(g)(2), an employer would also need to make an individualized determination as to whether the individual met the functional requirements set forth by the legislature. In other words, in spite of the disability, does the individual have the functional use of both hands, both arms, both feet, both legs, both eyes and both ears? A blanket application of I.C. 20-9.1-3-1(g)(2), without such individual determinations, could automatically exclude individuals who are qualified individuals with disabilities and do not pose a significant threat to the health or safety of others. Such determinations need to be made by the employer on an individual, case-by-case basis, and not by the rigid application of exclusionary categories.

Order

No violations by the Indiana Department of Education were found. No orders shall be issued.

DATE REPORT COMPLETED: June 28, 1995